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In the Supreme Court of the United States

OCTOBER TERM, 1957

THE UNITED STATES, PETITIONER

v.

MANUEL RODRIGUEZ TRADING CORPORATION AND MANUEL RODRIGUEZ

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on July 12, 1957, in the event that the petition in No. 664 is granted.[1]

OPINION BELOW

The opinion of the Court of Claims (Appendix B, *infra*, pp. 38–78) is reported at 153 F. Supp. 442.

JURISDICTION

The judgment of the Court of Claims was entered on July 12, 1957 (R. 69), and timely motions for rehearing by both parties were denied on October 9, 1957 (R. 110). By order of Mr. Chief Justice War-

[1] The respondent in this case has filed a petition to review the same judgment, No. 664, this Term. We are opposing that petition.

ren, dated January 3, 1958, the time for the United States to file a petition for a writ of certiorari was extended to and including February 6, 1958.

QUESTIONS PRESENTED

1. Whether respondent, who deliberately misrepresented his status as a citizen-purchaser in order to procure two surplus tankers from the Maritime Commission and subsequently to obtain Commission approval of the transfer of the vessels to Argentina, thereby violated Section 9 of the Shipping Act of 1916, prohibiting the transfer of American vessels to foreign registry without approval by the Commission.

2. Whether respondent is liable to the United States for the profits obtained as the result of his illegal transactions.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes, regulations, and contract provisions involved are set out in Appendix A, *infra*, pp. 29–37.

STATEMENT

Respondent's claim: Respondent [2] by contract dated April 6, 1948, acquired from the United States Mari-

[2] Respondent, Manuel Rodriguez Trading Corporation, which brought the suit below, was operated during its corporate existence by respondent Manuel Rodriguez as sole owner, and upon its dissolution on February 1, 1951, substantially all of its assets were distributed to him (App. B, *infra*, p. 40). Manuel Rodriguez was impleaded personally in the proceedings below and by order of the court joined as a party-plaintiff. The court below accordingly used the term "plaintiff" to refer either to the corporation or to Manuel Rodriguez personally, and we follow the same usage in this cross-petition with the term "respondent."

time Commission two T–1 tankers, the *Sugarland* and the *Capitan,* at a price of $887,019 each (App. B, *infra,* p. 40). This price was set in accordance with the Merchant Ship Sales Act of 1946, and applicable regulations governing sales to citizens of the United States (*infra,* pp. 29–36). The Merchant Ship Sales Act provided that the Maritime Commission might sell certain Government-owned war-built vessels to a citizen of the United States, as defined in the Act, at a "statutory sales price." In the case of tankers, statutory sales price was defined in Section 3 (d) of the Act, 50 U. S. C. App. 1736, as "an amount equal to 87½ per centum of the prewar domestic cost of a tanker of that type", subject to adjustments set forth therein. In the case of a tanker, the adjustments could not reduce the sales price to less than 50 percent of the domestic war cost, and the price of the *Capitan* and *Sugarland,* T–1–M–BT tankers, was fixed at the floor price of $887,019 (App. B, *infra,* p. 41). Under certain conditions, sales to non-citizens were authorized "at not less than the statutory sales price," but Senate Joint Resolution 173, Public Law 423, 80th Cong., 2d Sess. (*infra,* p. 35), approved February 27, 1948, expressly prohibited sales to non-citizens after March 1, 1948.

The contract with respondent provided for a reduction of price by an amount equal to the cost, as determined by the Commission, which would be required to enable the Commission to deliver the vessels in class with valid certificates of classification and inspection in accordance with the minimum requirements of the rules and regulations of the American

Bureau of Shipping and the United States Coast Guard Marine Inspection (App. B, *infra,* p. 40). Respondent filed claims for such price reductions and was allowed $135,442.79, i. e., on the *Sugarland* $4,094 for repairs and $15,259.37 for predelivery and maintenance expenses, and on the *Capitan* $94,067 for repairs and $22,022.42 for predelivery and maintenance expenses (App. B, *infra* p. 40). On the other hand, the Maritime Commission determined that the tankers contained "desirable features" within the meaning of Section 3 (d) (3) of the Merchant Ship Sales Act, *infra,* pp. 29–30, and pursuant to the purchase contract and respondent's consent, charged respondent the depreciated value of these desirable features, i. e., $27,650 on the *Sugarland* and $1,105.96 on the *Capitan* (App. B, *infra,* p. 41). Finally, the Maritime Commission determined that, since the vessels were sold to respondent pursuant to the policy governing sales to United States citizens, respondent should be charged only $42 for unrecouped repair expenses incurred by the Commission prior to the sales to respondent (App. B, *infra,* p. 41).

Title to the *Sugarland* and *Capitan,* respectively, passed to respondent on June 8, 1948 and August 20, 1948 (App. B, *infra,* p. 41). On October 21, 1948, respondent applied for approval to sell the tankers to the Argentine Naval Commission and to transfer them to Argentine registry and flag (App. B, *infra,* p. 41). The Maritime Commission approved the transfer on December 7, 1948, on the condition that the price reductions of $135,442.79, which had been allowed respondent as a citizen.

purchaser, were paid to the Commission, as well as the charge of $28,756.81 for desirable features, which he still owed the Commission (App. B, *infra*, p. 41). Respondent agreed, and deposited with the Commission a $200,000 check of the Argentine Naval Commission (App. B, *infra*, p. 41). The tankers were consequently transferred from United States registry (App. B, *infra*, p. 41). Respondent's subsequent attempts to obtain reconsideration by the Maritime Commission of its requirement that the class allowances be paid were unsuccessful (App. B, *infra*, p. 41), and respondent brought this action in the court below, seeking recovery both of the $135,442.79 which he had been required to pay when he sought to transfer the vessels to Argentine registry, and of the sum of $28,756.81 which he had been charged for "desirable features" (App. B, *infra*, p. 38). Respondent contended that the Maritime Commission had no authority to condition its approval of the sale and transfer upon payment of the class allowances, and that he was improperly charged for the cost of the desirable features[3] (App. B, *infra*, p. 39).

The Government's counterclaim: The Government filed a counterclaim against respondent, contending that he had procured the two tankers from the Maritime Commission and obtained the price reductions

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[3] In support of this latter contention, respondent urged that the statutory formula provided by the Merchant Ship Sales Act, *infra*, pp. 29–36, required the cost of desirable features to be added to the statutory sales price and then depreciated, and that this results in the cost of the desirable features for which respondent was charged being wholly absorbed and lost, although the floor price is maintained (App. B, *infra*, p. 39).

of $135,442.79 on the basis of misrepresentations that he was acquiring the tankers as a United States citizen for operation under American flag and registry, and that respondent, knowing that sale of these ships to non-citizens was expressly prohibited after March 1, 1948, by Public Law 423, 80th Cong. (*infra*, p. 35), was acquiring the tankers solely in order to sell and transfer them to the Argentine Naval Commission for operation under Argentine flag and registry (App. B, *infra*, p. 39). The Government denied liability for the sums sought by respondent, and demanded judgment on its counterclaim for the losses and damages sustained by reason of respondent's misrepresentations.

The court's findings: The Court of Claims found the circumstances leading to the purchase and subsequent resale of the tankers to be as follows (App. B, *infra*, pp. 42–49):

In November 1947, an employee of the Maritime Commission, John E. Jacobsen, advised respondent of the possibility that ten T–1 tankers might be purchased from the Maritime Commission for resale to Argentina. On December 19, 1947, respondent retained Jacobsen and Homer C. Clay to represent him in bringing about the sale of these tankers, Clay and Jacobsen to receive on a contingent basis a fee of $25,000 for each tanker purchased. On December 30 and 31, 1947, respondent conferred with representatives of the Argentine Naval Commission, a purchasing commission of the Argentine Government with its location in New York City. Respondent advised the Argentine representatives that the present basic sales

price of the ten tankers was $887,019, but that he would resell the tankers to them for $965,000 each (or less if more than five were obtained), with title and authority to transfer the ships to Argentine flag and registry, the offer being subject to the approval of the Maritime Commission. On February 4, 1948, Clay wired respondent that Congress would probably prohibit sales of war-built vessels to foreign countries after February 29, and urged him to file an application immediately. Respondent and the Argentine Naval Commission then entered into a contract, dated February 14, 1948, whereby the Naval Commission agreed to purchase ten tankers from respondent for $935,000 each, and delivered to respondent two checks, for $1,000,000 each, payable to the Treasurer of the United States.

Respondent on February 18, 1948 made written application to the Maritime Commission to purchase ten tankers at the statutory sales price for transfer to the Argentine flag, stating that he was not then and never had been engaged in the shipping business. On March 1, 1948, the Maritime Commission disapproved the application, but at 11:30 p. m. that evening it approved the sale of one tanker to respondent on these terms.

Respondent "was quite aware" (App. B, *infra*, p. 43) of the prohibition in Public Law 423, *infra*, p. 35, against sales to noncitizens after March 1, 1948, and so wrote the Argentine Naval Commission on March 5, 1948. At the same time, he advised the Naval Commission that he was endeavoring to obtain one or two additional vessels as a citizen-purchaser,

and would continue these efforts.[4] On March 7, 1948, respondent's attorney-in-fact, Homer C. Clay, wired the Secretary of the Maritime Commission amending respondent's application "to eliminate all reference to transfer of ships to Argentine registry" and advising that respondent "desires to purchase as American citizen." (App. B, *infra*, p. 43.) On March 10, 1948, respondent filed a formal amendment to this effect, striking from his original application all references to the transfer of the vessels to foreign registry. The amendment stated that respondent wished to purchase the vessels "as a United States citizen * * * for operation under the flag and registry of the United States," and that, if he were permitted to purchase the vessels, respondent would "obtain the services of one of the established and experienced ship operating companies" to operate them (App. B, *infra*, p. 43).

On March 11, 1948, approval of respondent's amended application was recommended to the Maritime Commission by the Chief of its Large Vessel Sales Division, who advised the Commission that respondent intended to purchase the vessels as an American citizen, and would obtain an experienced ship operating company to operate the vessels in established tanker trades. On March 12, 1948, the Maritime Commission approved respondent's application as to three T–1 tankers. However, the Navy Department requested the transfer of one tanker, and the Maritime Commission on March 31, 1948, approved

[4] The text of this letter is set out in the court's finding of fact 18, App. B, *infra*, pp. 59–61.

the sale to respondent of two tankers, the *Capitan* and *Sugarland*, "for operation under United States flag" (App. B, *infra*, p. 44).

On this same date, March 31, 1948, respondent contracted to sell these tankers to the Argentine Naval Commission with a view to their transfer to the Argentine Navy. The Naval Commission agreed to advance the official price of $887,019 each, and upon respondent's obtaining approval for transfer of the vessels to the Argentine flag, the Naval Commission would pay the balance of the price fixed by the offer of December 31, 1947, of $965,000 each if one to four tankers were acquired. The Naval Commission agreed to protect respondent from any loss in the event that a legal transfer of the ships was not possible, and agreed to pay all expenses incurred by respondent (App. B, *infra*, p. 44).[5]

In reliance, as the Court of Claims found, upon respondent's representations that he was purchasing the tankers as a United States citizen for operation under the United States flag (App. B; *infra*, pp. 44–45), the Maritime Commission on April 6, 1948, entered into formal contracts for the sale to respondent of the *Capitan* and *Sugarland*, at a price of $887,019 each. The down payments on the vessels were made by the Argentine Naval Commission, which on April 2, 1948, issued two $88,701.90 checks; on April 28, 1948, the Naval Commission paid respondent

[5] The texts of the contracts are set out in the court's finding of fact 21, App. B, *infra*, pp. 63–65; they recite that respondent was acting as agent of the Argentine Naval Commission in obtaining the tankers.

the $798,317.10 balance of the total purchase price (App. B, *infra*, p. 45).

The Court of Claims found that both respondent's books and accounting records and his federal tax returns showed that the tankers were purchased for sale and not for operation (App. B, *infra*, p. 45). The court found that respondent had never been engaged in the shipping business and had no experience in operating tankers, and that he made no effort to obtain the services of a ship operating company or to hire officers or a crew (App. B, *infra*, p. 45).

Following the Commission's allocation of the tankers, respondent was in constant consultation with the Argentine Naval Commission over their control and disposition. The Argentine representatives inspected the vessels, had work plans and specifications submitted to them in advance, and prepared plans and specifications for repairs which they sent to respondent in August 1948. The bills of sale and master carpenter's certificates were turned over to the Argentine representatives as soon as respondent received them from the Maritime Commission, and the Argentine Naval Commission stationed its own crew aboard the tankers to act as watchmen pending the contemplated transfer (App. B, *infra*, p. 45).

In August 1948, respondent inserted an advertisement in two New York newspapers offering T-1 tankers for sale; it received six responses, four indicating a desire for foreign registry and two suggesting domestic use, but respondent communicated with none. On August 30, 1948, however, the Argentine Naval Commission "purported" (App. B, *infra*, p.

46) to answer the advertisement and offered to purchase tankers with United States currency. A copy of the advertisement was attached to the Naval Commission's letter (App. B, *infra*, p. 46).

On October 21, 1948, respondent applied to the Maritime Commission for approval of a proposed sale and transfer of the *Capitan* and *Sugarland* to the Argentine Naval Commission. The application represented that the tankers had never been operated, and that they had been on the market for sale to American citizens for three months prior to the application but that no offers had been received. The proposed sale price was represented as "actual cost of vessel to owner" payable in cash. The application attached the Naval Commission's letter purporting to answer the advertisement, and represented that sale and transfer to the Argentine Naval Commission was desired as the tankers were unsuitable, conditions had changed, the initial "cost and repairs for the owner's account" exceeded $1,800,000 and maintenance costs were a threat to the company's solvency.[4]

The Chief of the Maritime Commission's Bureau of Government Aids recommended that the application be denied. However, at a meeting on December 7, 1948, Homer C. Clay and Ralph Immell appeared before the Commission and, after referring to the information contained in the application, advised the Commission that respondent had invested his entire

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[4] In an attachment to the application, set out in the court's finding of fact 25 (App. B, *infra*, pp. 68–70), respondent represented that he had made "diligent efforts to employ the vessels profitably in the domestic market."

personal fortune of $1,800,000 in the tankers, that to cut expenses crews had been reduced and guards put on board, and that respondent was obliged to sell the tankers or go into bankruptcy. It was also represented that the proposed sales price of $912,000, per tanker, adjusted for the value of the heating coils, might enable respondent to break even, but that he stood to lose $45,000. "At the hearing Mr. Clay specifically, on behalf of the [respondent], denied any possibility of an advance arrangement with the Argentine interests whereby later approval of the sale and transfer would be sought" (App. B, *infra*, p. 47). The Commission, by a three to two vote, thereupon approved the sale and transfer "* * * upon the condition that any and all allowances made to the Manuel Rodriguez Trading Corporation for placing the vessels in class and all monies due and owing the Commission by the said Manuel Rodriguez Trading Corporation shall be paid to the Commission prior to the issuance of any orders authorizing the transfer of flag and registry of the said vessels and the company waives any claims for allowances" (App. B, *infra*, p. 47).

On December 10, 1948, the Commission notified respondent of its conditional approval of the sales, and, because respondent requested that transfer orders be issued as early as possible, requested a $200,000 deposit. The Commission advised that the deposit would not preclude reconsideration but "it is also understood that any future action by the Commission on this matter will be acceptable to you as final."

Respondent accepted these prescribed conditions in a letter dated December 14, 1948, noting that he "accepts and agrees" and deposited a certified check of the Argentine Naval Commission for $200,000 (App. B, *infra*, p. 47). The transfer orders were thereupon issued by the Commission (App. B, *infra*, p. 47). On June 30, 1949, Clay and Immell filed application on respondent's behalf for reconsideration of the conditions set by the Commission.[1] The Commission denied the request on August 12, 1949 (App. B, *infra*, p. 48).

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[1] The application repeated the same representations which respondent had previously made as to the sale to Argentina, and stated (App. B, *infra*, p. 77) that the sale had occurred "after issuance of the foreign transfer orders" and that since respondent had sold the vessels to Argentina at the price he had paid the Maritime Commission, he could not be reimbursed by Argentina for the refund of the class allowances. Clay and Immell stated (*ibid.*):

> "* * * At the time these ships were purchased from the Maritime Commission there was no understanding that I know of, with anybody, that our client would appear subsequently and ask for an order to resell. It was definitely stated by people in authority for the Commission that no such arrangement would be tolerated.
>
> * * * * *
>
> "* * * If this were purely a bookkeeping entry we wouldn't be here. If the Rodriguez Trading Corporation, having purchased these ships, had let them sit idle and then subsequently sold them to the Argentine Naval Commission, we feel of course that in that case these allowances that you would make should be wiped out and the Rodriguez Trading Corporation should not profit by the extent of the allowances made for putting the ships in class."

On the basis of the foregoing findings, the Court of Claims concluded (App. B, *infra*, p. 48):

> Prior to March 1, 1948, and subsequently, the plaintiff was acting, in effect, as agent for the Argentine Naval Commission in acquiring the tankers and that at all times plaintiff planned in one way or another to accomplish their transfer from the Maritime Commission to Argentina.

The court stated further (App. B, *infra*, p. 49):

> * * * plaintiff was acting as agent for the Argentine Naval Commission but by his actions and assertations acquired the vessels as a citizen of the United States, thereby circumventing the provisions of law regarding sale to a noncitizen. Plaintiff procured the tankers and obtained the price reductions or class allowances on the basis of representations that it was acquiring the tankers as a United States citizen for operation under the United States flag and registry, knowing that sale to noncitizens was prohibited under Public Law 423, *supra*, whereas in fact it was acquiring the vessels in order to sell and transfer them to a noncitizen.

The court's computation of damages: In the light of these findings, the Court of Claims proceeded to consider respondent's claims, and the counterclaim by the United States for damages sustained as a result of respondent's misrepresentations. It found (App. B, *infra*, p. 48) that the *Capitan and Sugarland* were built in 1945, and that the Maritime Commission pursuant to the Merchant Ship Sales Act of 1946 had determined their domestic war cost

to be $1,774,038 each; their 1947 costs would have been about 15 percent greater or $2,040,143.70 each. Respondent paid the Maritime Commission a total of $1,802,836.81 for these two vessels, including the charges for desirable features and the class allowances, or $2,777,450.29 less than their replacement cost (App. B, *infra*, p. 48). The court found further that the Argentine Naval Commission had paid respondent a total of $2,202,223.87 for the tankers, and that exclusive of the $200,000 check of the Argentine Naval Commission deposited in December 1948, respondent's corporation made a gross profit on the sale of the two tankers of $153,959.29 (App. B, *infra*, p. 48).[8]

Respondent sought to retain this profit and to recover as well the sums of $135,442.79 for class allowances and $28,756.81 for desirable features. The Government, on the other hand, maintained that respondent was properly charged these amounts, and since he purchased the vessels for a non-citizen, he is liable for the unrecouped cost of repairs to the *Sugarland* in the amount of $49,852.01.[9] In addition, the Government claimed as damages and losses sustained as a result of respondent's misrepresentations (a) the

[8] In addition to this gross profit of $153,959.29, respondent apparently also kept the balance of some $35,000 which the Maritime Commission returned to him after deducting from the $200,000 deposit the cost of the desirable features and the now disallowed class allowances.

[9] The Court of Claims found (App. B, *infra*, p. 48):

"During the time the Maritime Commission was authorized to sell to noncitizens it charged noncitizens the unrecouped cost of repairs. In the case of the *Sugarland* this would have amounted to $49,894.01 but as a supposed citizen purchaser plaintiff was charged but $42 or $49,852.01 less."

value of the *Capitan* and *Sugarland;* (b) the difference between the amount paid for the tankers by the Argentine Naval Commission and the amount received by the Maritime Commission, or $399,387.06; and (c) the gross profit made by respondent on the illegal transaction.

The Court of Claims pointed out that, had the Argentine Naval Commission been permitted to purchase these tankers, "certainly the United States could have exacted" the deductions for class allowance and the charges for desirable features (App. B, *infra,* pp. 49–50), and held (App. B, *infra,* p. 50):

> Under these circumstances we believe plaintiff is in the same position as the Argentine Naval Commission, a noncitizen, would have been had it negotiated and purchased the tankers. That is to say, the Maritime Commission had every right to charge the Argentine Naval Commission more for the vessels than it could have charged a citizen, and there is no reason to believe that such a charge would not have been made. Thus the Maritime Commission, by reason of the representation of plaintiff, lost the difference in sale price and, if fraud were present, we could think of no reason why plaintiff should be permitted to profit thereby. However, no specific finding of fraud is made in this case and in the absence thereof, plaintiff would not be chargeable under a constructive trust for the proceeds received from the sale to the Argentine Naval Commission. Restatement of the Law of Restitution, Ch. 13, sec. 202; *United States* v. *Newbury Mfg. Co.,* 36 F. Supp. 602.

> Under these circumstances the Government is entitled to retain the $135,442.79 which plaintiff as a citizen saved under the floor price and the $28,756.81 charged for desirable features.

Turning to the Government's counterclaim, the court allowed recovery only for the unrecouped cost of repairs, or $49,894.01. The court held that this sum too, could have been charged a noncitizen purchaser, and accordingly that the Government, which had lost this money as a result of respondent's alleged purchase as a citizen, was entitled to recover this amount just as if the tankers had "been sold directly to the Argentine Naval Commission" (App. B, *infra, p.* 51). On the basis of its refusal to make "a specific finding of fraud," however, the court denied the Government recovery on the other elements of its counterclaim.

REASONS FOR GRANTING THE WRIT

There is no legal justification for the failure of the Court of Claims to award judgment to the United States in substantially the full amount of its counterclaims. The facts found by the court—that respondent procured the tankers *Sugarland* and *Capitan* from the Maritime Commission and obtained approval for their subsequent transfer to Argentine registry by deliberately misrepresenting his status as a citizen purchaser, "thereby circumventing the provisions of law regarding sale to a noncitizen" (*infra*, p. 49)—establish as a matter of law respondent's liability both to forfeit to the United States the value of the ships, and to surrender the profits of his illegal

transaction. The court's deliberate refusal to accord to its own findings their necessary legal implications has not only resulted in an injustice to the Government, but has, in effect, countenanced a deliberate thwarting of an important statutory objective. We believe that, if the case is taken, this Court should require the Court of Claims to award judgment to which the United States is entitled on the basis of the facts which that court itself found.

1. The facts found by the Court of Claims clearly establish a violation of Section 9 of the Shipping Act of 1916, as amended, 46 U. S. C. (1946 ed.) 808, *infra*, pp. 33–34. This statute makes it:

> * * * unlawful, without the approval of the United States Maritime Commission, to sell * * * deliver, or in any manner transfer, or agree to sell * * * deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States.

The Section provides further that:

> Any such vessel, or any interest therein, * * * sold, transferred, or mortgaged to a person not a citizen of the United States * * * in violation of any provision of this section shall be forfeited to the United States * * *.

The court below expressly found that, although respondent represented that he was purchasing the

tankers *Captain* and *Sugarland* for his own use as an American citizen, he in fact procured them as an agent of the Argentine government, intending at all times to accomplish their transfer to Argentina (*infra*, p. 49). In pursuing this unlawful scheme, he obtained approval from the Maritime Commission to transfer the vessels to Argentina registry by again representing that he had purchased the vessels for operation under United States registry, that he had invested his entire personal fortune in the ships, that he had made diligent but unsuccessful efforts to employ the vessels in the domestic market, that he had received no responses to his advertisement for the sale of the vessels except from sources contemplating foreign transfer, and, specifically, that no prior arrangement for such transfer had been made at the time respondent purchased the ships (*infra*, p. 49). The Court of Claims expressly found that each and every one of these representations was deliberately false, and was made in accordance with a preconceived design to circumvent the law (*infra*, p. 49).

Respondent's actions in deceiving the Maritime Commission into approving the transfer of the vessels to Argentina thus plainly violated the statutory prohibition against sales to non-citizens. It is clear that, had the Maritime Commission known the true facts, it would not—and indeed, under Public Law 423, *infra*, p. 35, legally could not—have approved either the sale of the tankers to respondent or their subsequent transfer to Argentina. Since respondent obtained the Commission's consent only as the result of his deliberate misrepresentations, in legal effect there

was no approval; consent which is obtained by fraud is, of course, no consent at all. Respondent's transfer of the tankers to Argentina accordingly violated the express mandate of Section 9 of the statute. *Meacham Corporation* v. *United States*, 207 F. 2d 535 (C. A. 4), certiorari granted, 347 U. S. 932, and dismissed by stipulation, 348 U. S. 801.[10]

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[10] In the *Meacham* case, the Court of Appeals held that the transfer of a surplus tanker from the Commission to a citizen corporation violated Section 9 of the Shipping Act of 1916 where the citizen corporation was in fact the *alter ego* of another corporation and subject to the dictation of aliens who controlled the latter corporation. In that case, as here, the nominal citizen owner of the vessel put up almost none of the money, the actual cost of the vessel being borne by its beneficial owner, the alien-controlled corporation; and the latter group had full control over the use and disposition of the ship. The Court of Appeals found no difficulty in cutting through the form of the transaction to its substance, 207 F. 2d at 543, and holding the vessel forfeit to the Government. The court held that the Shipping Act of 1916 and other statutes governing transfer of American vessels "were designed to preclude the very arrangement * * * whereby title to the ship was taken in the name of an American corporation, while the beneficial interest and actual control were passed to citizens of China" (*ibid.*). Rejecting the contention that the transaction was valid because approved by the Maritime Commission, the court pointed out that "all the facts were not disclosed" to the Commission (207 F. 2d at 546), and stated (207 F. 2d at 547):

"Manifestly, a government authority which was unwilling to sell the ships directly to United [the alien-controlled corporation] would have been unwilling to sell them to United by the indirect method, if all the facts had been placed before it."

The *Meacham* case is directly in point here; respondent's violation of Section 9 is equally clear, and particularly in view of the deliberate misrepresentations by which he accomplished his circumvention of the statute, he is plainly liable for the statutory forfeiture.

Having thus violated the statute, respondent is liable for the statutory damages, *i. e.*, forfeiture of the vessels. Since he has sold the ships themselves, his liability is for their value as a constructive trustee of the proceeds of the sale. Restatement, Restitution, § 202; *Buffum* v. *Peter Barceloux Co.*, 289 U. S. 227; *United States* v. *Newbury Mfg. Co.*, 36 F. Supp. 602 (D. Mass.). Accordingly, on the very facts found by the Court of Claims, the United States was entitled to recover $1,930,000, the amount received by respondent for the ships which he transferred to Argentine registry in violation of Section 9 of the Shipping Act of 1916.[11]

2. In addition to his liability under Section 9 of the Shipping Act of 1916 for the value of the tankers, respondent is also liable, under the general law of

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[11] Respondent's liability for forfeiture or its equivalent, which is fixed by the clear language of Section 9, is made even more clear by a consideration of the purposes of the Shipping Acts, objectives which respondent deliberately thwarted. As the Court of Appeals said in the *Meacham* case, *supra* (207 F. 2d at 542):

"The purpose of the statutes * * * is very clear. The preamble to the Shipping Act of 1916, 39 Stat. 728, explicitly states that it was enacted to * * * encourage, develop and create a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its possessions and with foreign countries. * * *

"[Section 2] of the Act was amplified and strengthened so as to prevent evasion of its intent by the Amendment contained in the Act of July 15, 1918, 40 Stat. 900, which sets out the terms of the present statute * * *.

"Section 9 of the statute has also been strengthened and enlarged so as to effectuate the underlying purpose of the legislation. * * *"

The forfeiture provisions of Section 9 were intended to aid in the achievement of the broad policy of encouraging and pro-

fraud and misrepresentation, for the profits sustained as a result of his illegal transactions. The Court of Claims expressly found—as respondent acknowledges in his own petition for certiorari in No. 664 (p. 3)—that respondent procured the *Sugarland* and *Captain* from the Maritime Commission "on the basis of representations that [he] was acquiring the tankers as a United States citizen for operation under the United States flag and registry, knowing that sale to noncitizens was prohibited under Public Law 423, *supra*, whereas in fact [he] was acquiring the vessels in order to sell and transfer them to a noncitizen." No clearer statement could be desired of the elements necessary to sustain an action based on fraud:[12] a false representation (that the tankers were being obtained for use under United States flag and registry), as to a material fact (by statute, the vessels could only have been sold for citizen use), and with

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tecting this nation's merchant marine so that it may serve the needs of commerce and defense. Consequently, the entire statute and all of its provisions should be regarded as remedial law, designed to foster and protect the many public interests in the merchant marine, and should be construed liberally so as to accomplish most effectually the objectives of Congress. Cf. *The Margaret*, 9 Wheat. 421, 424–425; *Cliquot's Champagne*, 3 Wall. 114, 115; *Taylor* v. *United States*, 3 How. 197, 210; *United States* v. *21 Pounds, 8 Ounces, of Platinum*, 147 F. 2d 78 (C. A. 4, 1945) (all involving forfeitures); *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 17; *Helvering* v *Mitchell*, 303 U. S. 391, 401.

[12] The elements of fraud have been defined by this Court in *Pence* v. *United States*, 316 U. S. 332, 338 as "(1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation."

knowledge of the falsity; these misrepresentations were of course relied upon as the basis of the Commission's action, and from these facts "the requisite intent to deceive is presumed, and therefore need not be proven in the absence of countervailing evidence." *Pence* v. *United States*, 316 U. S. 332, 339. Thus, the refusal of the Court of Claims to make "a specific finding of fraud" is, in these circumstances, without significance; whether recovery by the Government is bottomed upon contract or tort, all of the elements of a fraudulent misrepresentation have been established. See 2 Restatement, Contracts (1932) § 470; Prosser, *Torts* § 85 (1941 ed.); 5 Williston, *Contracts* § 1487.[13]

There is, of course, no question but that the Government was injured by respondent's fraudulent procurement of the tankers. It is well established

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[13] Indeed, the facts in this case are far stronger than those hypothesized in the following illustration of a fraudulent misrepresentation set forth in the Restatement of Contracts (§ 471, Illustration 4):

"4. A is informed by B that B will never sell Blackacre to A. Thereafter A employs C to secure a transfer to himself and then to transfer to A. C knows the facts. B in ignorance that the transaction is intended for the benefit of A, contracts with C to transfer the land to him. A and C by implication have justified B in assuming that A is not concerned in the transaction and therefore have made fraudulent misrepresentations."

Likewise, the Restatement (§ 473) makes clear as a matter of blackletter law that "[a] contractual promise made with the undisclosed intention of not performing it is fraud." As the Court of Claims found, respondent here represented that he would operate the ships under United States flag and registry but in fact planned "at all times * * * to accomplish their transfer from the Maritime Commission to Argentina."

that a seller has the right to select his purchaser (see *Federal Trade Commission* v. *Raymond Co.*, 263 U. S. 565, 573; *Green* v. *Victor Talking Machine Co.*, 24 F. 2d 378, 382 (C. A. 2), certiorari denied, 278 U. S. 602); and the law will protect a seller who has been misled into making a sale by virtue of the purchaser's false representation that he belongs to a class with whom the vendor is willing to deal, or that he is purchasing as a principal when in fact he is the agent of an undisclosed principal with whom the seller is unwilling to have any dealings. See 1 Williston, *Contracts* § 286, pp. 843–4, fn. 12; 5 Williston, *Contracts* § 1517, p. 4241, fn. 9, and cases there cited.

This rule is particularly applicable where, as here, the United States is induced by fraud to sell surplus property to one who by statute is not entitled to purchase it. As the Court recognized in *Rex Trailer Company* v. *United States*, 350 U. S. 148, 153, injury in such cases results to the Government, quite apart from any monetary loss, in the defeating of its program for applying the surplus material to specified purposes.[14] The policy embodied in Public Law 423,

[14] Thus, the Court found that Rex Trailer Company's fraudulent purchase of surplus trucks injured the Government in that it "precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation." 350 U. S. at 153. Similarly, where the Government was fraudulently induced to sell surplus medical supplies at a small fraction of their value on the representation that they were for the use of a non-profit hospital corporation, the Third Circuit held that "[a]t the very least there was a loss in the defeating of the Government's program for applying the surplus material to beneficial social purposes." *United States* v. *Round Brook Hospital, Inc.* (No. 12, 303, decided January 14, 1958).

governing the sale of surplus tankers, was an important one, involving fundamental considerations of national safety, as well as the economic wellbeing of the American merchant marine. The report of the Senate Committee on Interstate and Foreign Commerce, in recommending approval of Senate Joint Resolution 173 (later Public Law 423), concluded that continued sales of surplus tankers to non-citizens operated "to the detriment of the United States, whose own merchant-fleet tonnage, both active and reserve, might be lowered beyond safe, economic, and national-defense standards." Senate Report No. 856, 80th Cong., 2d Sess., p. 3.[15] See also 94 Cong. Rec. 751, 860, 1144, 1585, 1608–9.

Nor, in the circumstances of this case, is there any difficulty in measuring the extent of the recovery to which the Government is entitled as a result of respondent's fraud. Having acquired the surplus tankers from the Maritime Commission at a fraction

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[15] After discussing the economic impact of such sales on American shipping, and finding (p. 2) that "the further sale to foreigners of American vessels would, in the committee's opinion, result in a competitive disadvantage to American-flag operators," the Committee stated (p. 3):

"Beyond all this is the basic question of what tonnage should be retained in the American active and reserve fleets from a standpoint of national defense. The importance of a large merchant fleet to render vitally necessary auxiliary and logistical support to our military forces has been sharply demonstrated in two world wars. * * * Whether [the present number of vessels] * * * is ample for the Nation's defense requirements is yet to be established. But, in the opinion of the committee, this is not the time to gamble with the future, or take a chance that we will not require a large, quickly available merchant fleet."

of their true value, respondent proceeded on the same day to contract to resell them to the Argentine Naval Commission at a price of $965,000 each, thereby realizing, after adjustments, "a gross profit of $153,959.29 on the acquisition and transfer of the two tankers, exclusive of the $200,000 deposit" (App. B, *infra*, p. 48).[16] Aside from any out-of-pocket loss to the Government, respondent is clearly liable under principles governing unjust enrichment for this unfair gain from the purchases. Restatement, Restitution,

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[16] The sum of $153,959.29 does not include the respondent's liability for the class allowances and cost of desirable features, both of which charges he had paid the Maritime Commission in order to transfer the tankers to Argentina, but which he now seeks to recover, in his petition in No. 664. As noted in the Statement, *supra*, pp. 16–17, the Court of Claims has recognized the Government's right to retain these payments, as well as to recover an additional sum of $49,852.01 for unrecouped cost of repairs. Even under the Court's computation, however, respondent is still left with profits of $104,107.28, in addition to the balance of $35,800.40 which was returned to respondent after the cost allowances and cost of desirable features were deducted by the Maritime Commission from the Argentine Naval Commission's $200,000 check of December 1948, and for which respondent has completely failed to account. Although the Court of Claims made no specific finding as to the disposition of this latter sum, such a determination being unnecessary under the measure of liability erroneously adopted by the court, it seems clear that this money too must be included in computing respondent's profits from the illegal transactions.

§ 128, comment f; cf. *Rex Trailer Co.* v. *United States*, 350 U. S. 148, 153, footnote 6."

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[17] Since this recovery is based upon the quasi-contractual action of assumpsit, with damages measured in terms of the unjust enrichment of the wrongdoer, it is unnecessary to consider the problems that might arise in attempting to compute the monetary loss to the Government as a result of respondent's fraud. Presumably, however, the amount of damages would be approximately the same. Cf. *United States* v. *Bound Brook Hospital, Inc.* (C. A. 3, No. 12,303, decided January 14, 1958), holding that the United States is entitled to claim, as damage for the fraudulent procurement of surplus property, at least the difference between the price it received for surplus property and the price at which the fraudulent purchaser disposed of the property. The defendant in that case had fraudulently obtained surplus medical supplies from the Government at a substantial discount upon the representation that they were to be used by a nonprofit hospital corporation. Instead, the supplies were resold at a profit, and the Government brought suit under the Surplus Property Act of 1944, 58 Stat. 765, for the statutory damages of $2,000 for the fraudulent act "* * * and double the amount of any damage which the United States may have sustained by reason thereof * * *." In computing the Government's specific monetary damages, the court held (slip op. 3–4):

"We do not believe the question to be a difficult one. The defendant got property from the United States for about $2,000 which he resold for $34,000. The defendant is hardly in a position to urge that the property could not have been sold by the United States for as much as he got for it. It seems pretty clear, therefore, that the Government has suffered a pecuniary loss of at least as much as the difference between what it got from the defendant and what the defendant got from his purchaser. Under equitable principles of restitution the amount thus obtained by wrongful act could be recovered from the wrongdoer. * * * We do not think the measure of damages is any less under the terms of this statute * * *. The Government is content with this measure of damages and it is certainly not one of which the defendant can make complaint. Whether under other sets of fact a different method of ascertaining damages might be upheld we do not now decide."

CONCLUSION

For the foregoing reasons, we respectfully submit that this cross-petition for a writ of certiorari should be granted in the event that the petition in No. 664 is granted.

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Solicitor General.

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Assistant Attorney General,

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ROBERT S. GREEN,
Attorneys.

FEBRUARY 1958.

APPENDIX A

STATUTES, REGULATIONS AND CONTRACT PROVISIONS INVOLVED

1. STATUTORY PROVISIONS

The Merchant Ship Sales Act of 1946, 60 Stat. 41, 50 U. S. C. App. (1946 ed.) 1735, *et seq.*, provided in pertinent part as follows (as it appears in the United States Code):

§ 1736

* * * * *

(d) "Statutory sales price", as applied to a particular vessel, means, in the case of a dry-cargo vessel, an amount equal to 50 per centum of the prewar domestic cost of that type of vessel, and in the case of a tanker, such term means an amount equal to 87½ per centum of the prewar domestic cost of a tanker of that type, such amount in each case being adjusted as follows:

(1) If the Commission is of the opinion that the vessel is not in class, there shall be subtracted the amount estimated by the Commission as the cost of putting the vessel in class.

(2) If the Commission is of the opinion that the vessel lacks desirable features which are incorporated in the standard vessel used for the purpose of determining prewar domestic cost, and that the statutory sales price (unadjusted) would be lower if the standard vessel had also lacked such features, there shall be subtracted the amount estimated by the Commission as the amount of such resulting difference in statutory sales price.

(3) If the Commission is of the opinion that the vessel contains desirable features

which are not incorporated in the standard vessel used for the purpose of determining prewar domestic cost, and that the statutory sales price (unadjusted) would be higher if the standard vessel had also contained such features, there shall be added the amount estimated by the Commission as the amount of such resulting difference in statutory sales price.

(4) There shall be subtracted, as representing normal depreciation, an amount computed by applying to the statutory sales price (determined without regard to this paragraph) the rate of 5 per centum per annum for the period beginning with the date of the original delivery of the vessel by its builder and ending with the date of sale or charter to the applicant in question, and there shall also be subtracted an amount computed by applying to the statutory sales price (determined without regard to this paragraph) such rate not in excess of 3 per centum per annum in the case of a vessel other than a tanker, and not in excess of 4 per centum per annum in the case of a tanker, for such period or periods of war service as the Commission determines will make reasonable allowance for excessive wear and tear by reason of war service which cannot be or has not been otherwise compensated for under this subsection.

No adjustment, except in respect of passenger vessels constructed before January 1, 1941, shall be made under this Act which will result in a statutory sales price which (1) in the case of dry-cargo vessels (except Liberty type vessels) will be less than 35 per centum of the domestic war cost of vessels of the same type, (2) in the case of any Liberty type vessel will be less than 31½ per centum of the domestic war cost of vessels of such type, or (3) in the case of a tanker will be less than 50 per centum of the domestic war cost of tankers of the same type. For the purposes of this Act, except section 5, all Liberty

vessels shall be considered to be vessels of one and the same type.

* * * * *

(g) "Citizen of the United States" includes a corporation, partnership, or association only if it is a citizen of the United States within the meaning of section 2 of the Shipping Act of 1916, as amended. The term "affiliated interest" as used in sections 9 and 10 of this Act includes any person affiliated or associated with a citizen applicant for benefits under this Act who the Commission, pursuant to rules and regulations prescribed hereunder, determines should be so included in order to carry out the policy and purposes of this Act.

§ 1737

(a) Any citizen of the United States may make application to the Commission to purchase a war-built vessel, under the jurisdiction and control of the Commission, at the statutory sales price. If the Commission determines that the applicant possesses the ability, experience, financial resources, and other qualifications, necessary to enable him to operate and maintain the vessel under normal competitive conditions, and that such sale will aid in carrying out the policies of this Act, the Commission shall sell such vessel to the applicant at the statutory sales price.

* * * * *

§ 1739

(a) Any person not a citizen of the United States may make application to the Commission to purchase a war-built vessel (other than a P-2 type or other passenger type and other than a Liberty type collier or tanker), under the jurisdiction and control of the Commission. If the Commission determines—

(1) that the applicant has the financial resources, ability, and experience necessary to

enable him to fulfill all obligations with respect to payment of any deferred portion of the purchase price, and that sale of the vessel to him would not be inconsistent with any policy of the United States in permitting foreign sales under section 9 of the Shipping Act, 1916, as amended; and

(2) after consultation with the Secretary of the Navy, that such vessel is not necessary to the defense of the United States; and

(3) that such vessel is not necessary to the promotion and maintenance of an American merchant marine described in section 2; and

(4) that for a reasonable period of time, which in the case of tankers and "C" type vessels shall not end before ninety days after publication of the applicable prewar domestic cost in the Federal Register under subsection 3 (c) of this Act, such vessel has been available for sale at the statutory sales price to citizens of the United States, or for charter under section 5 to citizens of the United States, and that no responsible offer has been made by a citizen of the United States to purchase or charter such vessel;

then the Commission is authorized to approve the application and sell such vessel to the applicant at not less than the statutory sales price. In case of application submitted by a citizen of the Commonwealth of the Philippines, paragraph (4) of this subsection shall not apply. Notwithstanding paragraph (4) of this subsection, not to exceed ten "C" type vessels, except C–3's, may be sold to noncitizens at any time after such date of publication at not less than the statutory sales price.

(b) Notwithstanding any other provision of law, no war-built vessel shall be sold to any person not a citizen of the United States, except in accordance with subsection (a), or upon terms or conditions more favorable than those at which such war-built vessel is offered to a

citizen of the United States, but where the vessel so sold is being transferred to foreign register and flag, the mortgage securing the unpaid balance of the purchase price and interest thereon shall contain provisions according to such mortgage the priorities over other liens and encumbrances accorded such mortgages on merchant vessels under the laws of such registry and flag.

The Shipping Act of 1916, as amended, 39 Stat. 728, 46 U. S. C. (1946 ed.) 801, *et seq.*, provides in pertinent part as follows (as it appears in the United States Code):

§ 808

Any vessel purchased, chartered, or leased from the United States Maritime Commission, by persons who are citizens of the United States, may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: *Provided,* That foreign-built vessels admitted to American registry or enrollment and license under this chapter, and vessels owned by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered by the commission to any person a citizen of the United States, as provided in this chapter, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.

Every vessel purchased, chartered, or leased from the commission shall, unless otherwise authorized by the commission, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein.

Except as provided in section 1181 of this title, it shall be unlawful, without the approval of the United States Maritime Commission, to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States.

Any such vessel, or any interest therein, chartered, sold, transferred, or mortgaged to a person not a citizen of the United States or placed under a foreign registry or flag, or operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than $5,000, or to imprisonment for not more than five years, or both.

* * * * *

§ 839

Whenever by section 808 or 835 of this title the approval of the commission is required to render any act or transaction lawful, such approval may be accorded either absolutely or upon such conditions as the commission prescribes. Whenever the approval of the commission is accorded upon any condition a statement of such condition shall be entered upon its records and incorporated in the same document or paper which notifies the applicant of such approval. A violation of such condi-

tion so incorporated shall constitute a misdemeanor and shall be punishable by fine and imprisonment in the same manner, and shall subject the vessel, stocks, bonds, or other subject matter of the application conditionally approved to forfeiture in the same manner, as though the act conditionally approved had been done without the approval of the commission, but the offense shall be deemed to have been committed at the time of the violation of the condition.

Whenever by this chapter the approval of the commission is required to render any act or transaction lawful, whoever knowingly makes any false statement of a material fact to the commission, or to any member thereof, or to any officer, attorney, or agent thereof, for the purpose of securing such approval, shall be guilty of a misdemeanor and subject to a fine of not more than $5,000 or to imprisonment for not more than five years, or both.

Senate Joint Resolution 173, Public Law 423, 80th Cong., 2d Sess., 62 Stat. 38, 50 U. S. C. App. 1739, Historical Note, provides in pertinent part as follows:

(b) Notwithstanding the provisions of subsection (a), no contract of sale under section 6 of the Merchant Ship Sales Act of 1946 shall be made after March 1, 1948; and nothing contained in this or any other Act shall be deemed to authorize the United States Maritime Commission to charter any war-built vessel (as defined in the Merchant Ship Sales Act of 1946) to any person who is not a citizen of the United States (as defined in the Merchant Ship Sales Act of 1946.)

2. REGULATIONS

United States Maritime Commission General Order No. 60, 11 Fed. Reg. 4459, April 23, 1946, provides in pertinent part:

§ 299.1

* * * * *

(h) *Citizen of the United States.* "Citizen of the United States" includes a corporation, partnership, or association only if it is a citizen of the United States within the meaning of section 2 of the Shipping Act, 1916, as amended, and section 905 (c) of the Merchant Marine Act, 1936, as amended. The Secretary of the Commission will furnish, on request, copies of memoranda dealing with citizenship.

(i) *Affiliated interest.* The term "affiliated interest" shall include any person or concern that directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the applicant. The term "control" (including the terms "controlled by" and "under common control with") as used in this paragraph means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the applicant, whether through ownership of voting securities, by contract, or otherwise.

* * * * *

General Order No. 60, Supplements 1 and 3, 11 Fed. Reg. 4702, 8972 set forth the computations of the domestic war cost and the floor price of T1–M–BT tankers.

3. CONTRACT PROVISIONS

The contract appears as an Appendix to the original petition in the Court of Claims, filed in June 19, 1951. It provides:

* * * * *

ARTICLE 1. *Agreement to Purchase.*—Subject to the provisons hereinafter set forth and to

all applicable provisions of the Act and Regulations, whether specifically referred to or not, the Buyer agrees to purchase from the Commission and the Commission agrees to sell to the Buyer the vessel(s).

It is understood and agreed that if for any reason the vessel(s) cannot be delivered by the Commission to the Buyer as herein provided, similar vessel(s) acceptable to the Buyer, may, pursuant to an addendum to this agreement, be delivered by the Commission in substitution therefor.

* * * * *

ARTICLE 4. *Purchase Price(s) of the Vessel(s).*—The Commission has determined, pursuant to the provisions of the Act, giving effect to all adjustments (except for the absence or presence of desirable features as defined in clauses (2) and (3) of Sec. 3 (d) of the Act) permitted by the Act and applicable to the vessel, that the purchase price thereof shall be as set forth in Exhibit "A" attached hereto and forming a part hereof.

* * * * *

ARTICLE 9. *Documentation of the Vessel(s).*—The (each) vessel shall be documented under the laws of the United States by the Buyer immediately after sale and delivery thereof to the Buyer.

* * * * *

EXHIBIT A

* * * * *

I. Purchase Price(s) of the Vessel(s). * * *

The Buyer agrees, if it shall be determined by the Commission upon examination of the (each) vessel, that the vessel lacks or contains desirable features as defined in clauses (2) and (3) of Sec. 3 (d) of the Act, then such purchase price shall be decreased, within the limits of the floor price of the vessel, or increased, by such amounts, if any, as may be determined by the Commission pursuant to said clauses.

APPENDIX B

Opinion and Findings of the Court of Claims

In the United States Court of Claims

No. 50197

(Decided July 12, 1957)

MANUEL RODRIGUEZ TRADING CORPORATION and MANUEL RODRIGUEZ v. THE UNITED STATES

Mr. Homer C. Clay for the plaintiff.

Mr. Edward L. Metzler, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

OPINION

Laramore, *Judge*, delivered the opinion of the court:

This is a suit by plaintiff, Manuel Rodriguez Trading Corporation, to recover sums of $135,442.79 and $28,756.81 paid to the U. S. Maritime Commission. The defendant counterclaims for damages, and Manuel Rodriguez has been joined as a party plaintiff under rule 23 of this court.

The $135,442.79 was paid to the Maritime Commission by plaintiff under an agreement made in December 1948 that the Commission would approve plaintiff's sale of the tankers *Capitan* and *Sugarland* to the Argentine Naval Commission and their transfer to Argentine registry and flag, which was accomplished. The $135,442.79 represented reductions in the statutory sale price of the two tankers which had been acquired by a contract dated April 6, 1948. The reductions were allowed plaintiff by the Maritime Commission under section 3 (d) (1) of the Merchant Ship Sales Act of 1946, 60 Stat. 41, as amended 62 Stat. 1196, 1199. The $28,756.81 represents the Maritime Commission's charges for "desirable features" not found in standard vessels, payment for which was agreed to by plaintiff in the contract dated April 6, 1948, and by an agreement made in December 1948.

Plaintiff contends that it is entitled to recover the $135,442.79 under the decision of this court in *Norton Clapp* v. *United States*, 127 C. Cls. 505 and asserts that the Maritime Commission did not have authority to condition its approval of the sale and transfer by requiring that the class allowance be refunded, and that such requirement was also a breach of contract.

Plaintiff contends it is entitled to recover the $28,756.81 paid for "desirable features" under the decision of this court in *A. H. Bull Steamship Co.* v. *United States*, 123 C. Cls. 520. It contends that the statutory formula provided by the Merchant Ship Sales Act, *supra*, requires the cost of desirable features to be added to the statutory sales price and then depreciated, and that this results here in the cost of desirable features being wholly absorbed and lost, although the floor price is maintained. Plaintiff further contends that a citizen's purchase of tankers after March 1, 1948, for the purpose of resale to aliens, would not violate Public Law 423, 62 Stat. 38, if the Maritime Commission approved.

The defendant contends that plaintiff procured the two tankers from the Maritime Commission and obtained price reductions of $135,442.79 on the basis of misrepresentations that it was acquiring the tankers as a United States citizen for operation under American flag and registry, and that plaintiff, knowing that sales to noncitizens were expressly prohibited after March 1, 1948, by Public Law 423, was not acquiring the tankers for American flag ownership and operation, but in order to sell and transfer them to the Argentine Naval Commission for operation under Argentine flag and registry.

Public Law 423 provides in pertinent part as follows:

> (b) Notwithstanding the provisions of subsection (a), no contract of sale under section 6 of the Merchant Ship Sales Act of 1946 shall be made after March 1, 1948; and nothing contained in this or any other Act shall be deemed to authorize the United States Maritime Commission to charter any war-built vessel (as defined in the Merchant Ship Sales Act of 1946) to any person who is not a citizen of the United States (as defined in the Merchant Ship Sales Act of 1946).

The government further contends that it is entitled to judgment on its counterclaim for the losses and damages sustained by reason of plaintiff's misrepresentations.

The facts as found by the Commissioner and adopted by the court are as follows:

The Manuel Rodriguez Trading Corporation was, from January 1947 to February 1951, a New York corporation with its principal place of business at 220 Broadway, New York City, New York. Only 80 shares of the corporate stock were issued. During the corporate existence Manuel Rodriguez was the president and actually operated as sole owner. As of September 2, 1948, he had formally acquired the 30 shares issued January 30, 1947, in the name of his wife, Adela Rodriguez, a citizen of Cuba. As of December 29, 1950, the assets of the corporation were distributed to the two remaining stockholders, Rodriguez receiving $336,191.81 and Louis Russell $4,255.59. A certificate of dissolution was filed February 1, 1951, dated December 29, 1950.

Manuel Rodriguez has been impleaded personally and by order of the court joined as a party plaintiff. The term plaintiff as used herein refers to the corporation or to Manuel Rodriguez personally.

Plaintiff by contract dated April 6, 1948, acquired from the U. S. Maritime Commission two T–1 tankers, the *Sugarland* and the *Capitan*, at a price of $887,019 each. The price was in accordance with the Merchant Ship Sales Act of 1946 and the rules and regulations issued pursuant thereto as set forth in the Maritime Commission's General Order 60. The contract provided for a reduction of price by an amount equal to the cost, as determined by the Commission, which would be required to enable the Commission to deliver the vessels in class with valid certificates of classification and inspection in accordance with the minimum requirements of the rules and regulations of the American Bureau of Shipping and the U. S. Coast Guard Marine Inspection. Plaintiff filed claims for such price reductions and was allowed $135,442.79, *i. e.*, on the *Sugarland* $4,094 for repairs and $15,259.37 for predelivery and maintenance expenses, and on the *Capitan* $94,067 for repairs and $22,022.42 for predelivery and maintenance expenses.

Title to the *Sugarland* and *Capitan*, respectively, was transferred to plaintiff on June 8, 1948, and August 20, 1948. Plaintiff thereafter, on October 21, 1948, applied for approval to sell the tankers to the Argentine Naval Commission and to transfer them to Argentine registry and flag. On December 7, 1948, the Commission approved the sale and transfer on the condition that the price reductions or class allowances were paid. Plaintiff agreed and deposited a $200,000 check of the Argentine Naval Commission. The tankers were consequently transferred from United States registry. On June 3, 1949, plaintiff requested that the Maritime Commission reconsider its requirement that the $135,-442.79 be paid, but the Maritime Commission adhered to its decision, and denied a request for reconsideration.

The Maritime Commission also determined that the tankers contained desirable features and pursuant to the purchase contract and plaintiff's consent charged plaintiff the depreciated value of the desirable features, *i. e.* $27,650 on the *Sugarland* and $1,105.96 on the *Capitan*. The Maritime Commission also determined that under Article IV of the contract applying to a citizen sale plaintiff should be charged only $42 for unamortized repairs made on the *Sugarland*, deducted this amount from a deposit and refunded the balance.

THE GOVERNMENT'S COUNTERCLAIM

The Merchant Ship Sales Act of 1946 provided that the Maritime Commission might sell certain Government-owned war-built vessels to a citizen of the United States, as defined in the act, at a "statutory sales price." In the case of tankers statutory sales price was defined in the act (section 3 (d) to mean "an amount equal to 87½ per centum of the prewar domestic cost of a tanker of that type" subject to adjustments set forth therein. In the case of a tanker the adjustments could not reduce the sales price to less than 50 percent of the domestic war cost and the price of the *Capitan* and *Sugarland*, T–1–M–BT tankers, was fixed at the floor price of $887,019. Under certain conditions sales to noncitizens were authorized "at not less than the statutory sales price" but Senate Joint Resolution 173, Public Law 423, 80th Congress, 2d session, approved February 27, 1948, expressly

prohibited sales to noncitizens after March 1, 1948. The questioned transactions occurred subsequent to March 1, 1948.

In November 1947 an employee of the Maritime Commission, John E. Jacobsen, advised Rodriquez that there was a possibility that ten T–1 tankers might be purchased from the Maritime Commission for resale to Argentina. At that time the Argentine Government had a purchasing commission known as the Argentine Naval Commission located in New York City. The Naval Commission was headed by Rear Admiral Athos Colonna, and Captain Julio Mazzoli, Naval Architect, was in charge of ship inspections. On December 19, 1947, plaintiff retained Homer C. Clay and Jacobsen to represent it in bringing about the sale of ten or less tankers. Clay and Jacobsen were to receive on a contingent basis a fee of $25,000 for each tanker purchased. On December 30 and 31, 1947, Rodriguez conferred with representatives of the Argentine Naval Commission advising that the present basic sales price of the ten tankers was $887,019 but that he would sell them for $965,000 each (or less if more than five were obtained) with title and authority to change the flag, etc., the offer being subject to approval of the Maritime Commission. On February 4, 1948, Clay wired Rodriquez that there was a strong probability Congress would prohibit sales of war-built vessels to foreign countries after February 29 and urged filing an application immediately. Plaintiff and the Argentinle Naval Commission then entered into a contract whereby the Naval Commission was to purchase ten tankers from plaintiff for $935,000 each and delivered two checks, payable to the Treasurer of the United States, for $1,000,000 each. The checks were certified respectively by the Chase National Bank and the National City Bank, both of New York City on February 16, 1948.

On February 18, 1948, plaintiff made written application to the Maritime Commission to purchase ten tankers at the statutory sales price for transfer to the Argentine flag stating that it was not then and never had been engaged in the shipping business. On March 1, 1948, the Maritime Commission disapproved the application but at 11:30 P. M. March 1, 1948, approved the sale of one tanker to plaintiff for transfer to Argentina.

Senate Joint Resolution 173, as stated, prohibited the sale of a war-built vessel to a noncitizen after March 1, 1948. Rodriquez was quite aware of the prohibition which had been imminent and so wrote the Argentine Naval Commission on March 5, 1948. At the same time plaintiff advised that Commission that Rodriguez was endeavoring to obtain one additional tanker on the premise the corporation was a citizen purchaser, as well as still another vessel, and that their efforts would be continued.

On March 7, 1948, plaintiff's attorney in fact, Homer C. Clay, wired the Secretary of the Maritime Commission as follows:

> APPLICATION MANUEL RODRIGUEZ TRADING CORP. HEREBY AMENDED TO ELIMINATE ALL REFERENCE TO TRANSFER OF SHIPS TO ARGENTINE REGISTRY APPLICANT DESIRES TO PURCHASE AS AMERICAN CITIZEN TERMS CASH ON DELIVERY WITH TWO MILLION DOLLARS NOW DEPOSITED WITH APPLICATION TO BE APPLIED ON PURCHASE PRICE.

On March 10, 1948 plaintiff filed a formal amendment to its February 18, 1948 application by striking therefrom:

> * * * * *
>
> * * * All reference to the transfer of the vessels referred to therein to foreign flag or registry and to provide that the applicant will purchase any one or more of the vessels referred to in said application as a United States citizen (applicant is a New York corporation) for operation under the flag and registry of the United States and to further provide that should applicant be granted the right to purchase any vessel or vessels pursuant to its amended application, applicant will obtain the services of one of the established and experienced ship operating companies to operate said vessel or vessels.

On March 11, 1948, plaintiff's amended application was referred to the Maritime Commission by memorandum from the appropriate officer, the Chief of the Large Vessel Sales Division, James L. Pimper, who recommended the sale of two T1–M–BT tankers with the advice that the "applicant wishes to eliminate original reference to transfer to Argentine registry and purchase as an American Citizen" and to pay cash in full on delivery. The Commission was advised that:

> Applicant claims no shipping experience but states that it will obtain the services of one of the established and experienced ship operating companies to operate the vessels when purchased.
>
> * * * * *
>
> * * * since the applicant offers to pay cash in full for the vessel, the Commission is justified in considering that the applicant possesses the necessary financial resources.
>
> * * * * *
>
> Applicant proposes to operate the vessels in established tanker trades, chiefly from North Atlantic ports to the River Platte and occasionally from Venezuelan ports to the River Platte.
>
> * * * * *

On March 12, 1948, the Commission approved plaintiff's application as to three T–1 tankers. However, the Navy Department requested the transfer of one tanker and the Maritime Commission on March 31, 1948, approved the sale of two tankers, the *Capitan* and *Sugarland*, "for operation under United States flag," the terms of payment to be "cash in full on delivery."

Under date of March 31, 1948, the date the Maritime Commission approved the sale for operation under United States flag, plaintiff and the Argentine Naval Commission entered into contracts relating to the *Capitan* and *Sugarland*. The contracts recited in part that plaintiff sold said tankers to the Naval Commission with a view to their transfer to the Argentine Navy, that the Naval Commission would turn over the official price of $887,019 each, and upon obtaining plaintiff's approval for transfer to the Argentine flag the Naval Commission would pay the price fixed by the offer of December 31, 1947; *i. e.*, $965,000 if 1 to 4 tankers were acquired. Paragraph G of the contracts provided that in the event a legal transfer was not possible and in the event of a disagreement over settlement the ships would be sold without loss to plaintiff, or 20 percent of the profits. In the event of United States expropriation its payment was to be immediately transferred to the Naval Commission. The Naval Commission was also to pay all other expenses incurred, subject to its written approval.

In reliance upon plaintiff's representations that the tankers were purchased by plaintiff as a United States citizen for

operation under the flag of the United States for Maritime Commission, under date of April 6, 1948, entered into the formal sales contract referred to in finding 2 for sale of the *Capitan* and *Sugarland* at $887,019 each.

The Argentine Naval Commission made the down payments on the *Capitan* and *Sugarland* on April 2, 1948, by issuing two $88,701.90 checks.

On April 28, 1948, the Argentine Naval Commission paid plaintiff the $798,317.10 balance of the $887,019 floor price on each tanker.

Plaintiff's books and accounting records show the tankers were sold to the Argentine Naval Commission in April 1948, that the tankers were purchased for resale and not for operation and that they were carried as merchandise inventory until June 30, 1948, when the books showed the Argentine Naval Commission had advanced $965,000 on sales contracts on each of the tankers. Plaintiff's Federal tax returns also show the purchases were for sale rather than operation.

Neither Rodriguez nor the corporation had ever been engaged in the shipping business and had no experience in operating tankers. No effort was made to obtain the services of a ship operating company or to hire officers or a crew.

Following the allocation of the tankers Rodriguez was in constant consultation with the Argentine Naval Commission over the control and disposition of the tankers. The Argentine representatives inspected the vessels, work plans and specifications were submitted to them in advance, and they prepared plans and specifications for repairs and sent them to Rodriguez in August 1948. Upon closing the sales with the Maritime Commission in June and August 1948 the bills of sale and master carpenter's certificate were delivered to plaintiff's attorney-in-fact, Homer C. Clay. These documents were promptly turned over to the Argentine representatives. Pursuant to arrangements between Rodriguez and Admiral Colonna, the Argentine Naval Commission also stationed its own crew aboard the tankers to act as watchmen pending the contemplated transfer.

In August 1948 plaintiff inserted an ad in the New York Journal of Commerce advertising T–1 tankers for sale: "United States flag. Immediate delivery. Principals only.

All cash in dollars." A similar advertisement was inserted in the New York Times of August 29, 1948. Four responders indicated a desire for foreign registry and two suggested domestic use, but plaintiff communicated with none.

Under date of August 30, 1948, however, a letter was prepared to plaintiff from the Argentine Naval Commission over the signature of Rear Admiral Colonna in which the Argentine Naval Commission purported to answer the ad appearing in the New York Journal of Commerce for August 27, 1948, and offered to purchase tankers with U. S. currency. A copy of the ad was attached to the Naval Commission's letter.

On October 21, 1948, plaintiff transmitted to the Maritime Commission its application for the approval required by Sections 9 and 41 of the Shipping Act of 1916, as amended, of a proposed sale and transfer of the *Capitan* and *Sugarland* to Argentine registry and sale to an alien, namely, the Argentine Naval Commission. The applications represented that the tankers had never been operated, and that they had been on the market for sale to American citizens for three months prior to the application but no offers had been received. The proposed sale price was represented as "actual cost of vessel to owner" payable in cash. The application attached Admiral Colonna's letter purporting to answer the ad, and represented that sale and transfer to the Argentine Naval Commission was desired as the tankers were unsuitable, conditions had changed, the initial "cost and repairs for the owner's account" exceeded $1,800,000 and maintenance costs were a threat to the company's solvency.

The Chief of the Maritime Commission's Bureau of Government Aids recommended that the application be denied. However, at a meeting on December 7, 1948, Homer C. Clay and Ralph Immell appeared before the Commission and, after referring to the information contained in the application, advised the Commission further that plaintiff's president had invested his entire personal fortune of $1,800,000 in the tankers, that to cut expenses crews had been reduced and guards put on board, and that plaintiff was obliged to sell the tankers or go into bankruptcy. It was also represented that the proposed sales price of $912,000 per tanker,

adjusted for the value of the heating coils, might enable Rodriguez to break even but he stood to lose $45,000. At the hearing Mr. Clay specifically, on behalf of the plaintiff, denied any possibility of an advance arrangement with the Argentine interests whereby later approval of the sale and transfer would be sought. At the December 7, 1948 meeting the Commission by a 3 to 2 vote approved the sale and transfer "* * * upon the condition that any and all allowances made to the Manuel Rodriguez Trading Corporation for placing the vessels in class and all monies due and owing the Commission by the said Manuel Rodriguez Trading Corporation shall be paid to the Commission prior to the issuance of any orders authorizing the transfer of flag and registry of the said vessels and the company waives any claims for allowances." By memorandum of December 9, 1948, the Commission advised its Chief, Bureau of Government Aids, of its conditional approval, and on December 10, 1948 the Commission also notified plaintiff of its approval under the conditions noted above, and, because plaintiff requested that transfer orders be issued as early as possible requested a $200,000 deposit. The Commission advised that the deposit would not preclude reconsideration but "it is also understood that any future action by the Commission on this matter will be acceptable to you as final". Plaintiff accepted these prescribed conditions in a letter dated December 14, 1948, noting it "accepts and agrees" and deposited a certified check of the Argentine Naval Commission for $200,000.

Subsequently the Commission delivered transfer orders to plaintiff authorizing the sale of the tankers to the Argentine Naval Commission and their transfer to Argentine registry and flag. The conditions were not repeated in the transfer orders as neither the Commission's regulations nor practice required this.

The Maritime Commission had agreed to reconsider its action on the charges if plaintiff would accept such action as final. Plaintiff agreed to this. On June 30, 1949, Clay and Ralph Immell also filed a formal application for reconsideration repeating the same representations as were made before the sale to the Argentine Naval Commission.

They stated the sale occurred "after issuance of the foreign transfer orders" and as plaintiff had sold at the price paid the Maritime Commission it could not be reimbursed by the Argentine Naval Commission because of the refund of the class allowances. It was stated that there was no understanding that Rodriguez would appear subsequently and ask for an order to resell and that if the corporation "having purchased these ships, had let them sit idle and then subsequently sold them to the Argentine Naval Commission" the allowances should be wiped out and the plaintiff should not profit by them. The Commission denied the request August 12, 1949, and plaintiff was so advised.

Prior to March 1, 1948, and subsequently, the plaintiff was acting, in effect, as agent for the Argentine Naval Commission in acquiring the tankers and that at all times plaintiff planned in one way or another to accomplish their transfer from the Maritime Commission to Argentina.

The *Capitan* and *Sugarland* were built in 1945. The Maritime Commission pursuant to the Merchant Ship Sales Act of 1946 determined that their domestic war cost was $1,774,038 each. Their 1947 costs would have been about 15 percent greater or $2,040,143.70. In March 1948 the Argentine Naval Commission offered to pay $965,000 for each vessel. The Argentine Naval Commission paid $2,202,223.87 for the tankers. According to plaintiff's available records, which do not show what occurred with respect to the $200,000 deposit made by check of the Argentine Naval Commission, plaintiff corporation made a gross profit of $153,959.29 on the acquisition and transfer of the two tankers, exclusive of the $200,000 deposit.

The Maritime Commission received a total of $1,802,836.81 for the vessels which would have cost $4,080,287.40 to replace or $2,777,450.29 less than the replacement cost.

During the time the Maritime Commission was authorized to sell to noncitizens it charged noncitizens the unrecouped costs of repairs. In the case of the *Sugarland* this would have amounted to $49,894.01 but as a supposed citizen purchaser plaintiff was charged but $42 or $49,852.01 less. The Government also counterclaims for this item.

The facts clearly show and the court has found that plaintiff was acting, in effect, as agent for the Argentine Naval Commission in acquiring these vessels and that at all times plaintiff planned in one way or another to accomplish the transfer of these vessels from the Maritime Commission to the Argentine Naval Commission.

In this climate what then is the result of such action. Plaintiff says this court's decision in the *Norton Clapp* case, *supra*, decides the question. However, we are not inclined to that view. The plaintiff in the *Norton Clapp* case acquired the ship in question in 1949 from an owner who had previously acquired the same from the Maritime Commission in 1947. In 1951 Norton Clapp contracted to sell the ship to a Finnish corporation and applied for approval of the same. The Maritime Commission approved the sale upon payment of the sum of $7,500 as "consideration for release of obligation to operate vessels under United States laws." The court in the *Norton Clapp* case held that the limitation of sale to domestic bidders was because the Maritime Commission at that time was unwilling for ships to be sold to aliens at any price and that in 1951 the reasons for the restriction were no longer present. The court further found that price had nothing to do with either the restriction or the removal and the $7,500 charge was irrelevant.

It must be borne in mind that the plaintiff in the *Norton Clapp* case was a citizen of the United States. Here the situation is different—plaintiff was acting as agent for the Argentine Naval Commission but by his actions and assertions acquired the vessels as a citizen of the United States, thereby circumventing the provisions of law regarding sale to a noncitizen. Plaintiff procured the tankers and obtained the price reductions or class allowances on the basis of representations that it was acquiring the tankers as a United States citizen for operation under the United States flag and registry, knowing that sale to noncitizens was prohibited under Public Law 423, *supra*, whereas in fact is was acquiring the vessels in order to sell and transfer them to a noncitizen.

Had the Argentine Naval Commission been permitted to purchase the tankers, certainly the United States could have

exacted the $135,442.79 and could further have charged for the desirable features.[1]

Under these circumstances we believe plaintiff is in the same position as the Argentine Naval Commission, a noncitizen, would have been had it negotiated and purchased the tankers. That is to say, the Maritime Commission had every right to charge the Argentine Naval Commission more for the vessels than it could have charged a citizen, and there is no reason to believe that such a charge would not have been made. Thus the Maritime Commission, by reason of the representation of plaintiff, lost the difference in sale price and, if fraud were present, we could think of no reason why plaintiff should be permitted to profit thereby. However, no specific finding of fraud is made in this case and in the absence thereof, plaintiff would not be chargeable under a constructive trust for the proceeds received from the sale to the Argentine Naval Commission. Restatement of the Law of Restitution, Ch. 13, sec. 202; *United States* v. *Newbury Mfg. Co.*, 36 F. Supp. 602.

Under these circumstances the Government is entitled to retain the $135,442.79 which plaintiff as a citizen saved under the floor price and the $28,756.81 charged for desirable features.

Defendant counterclaims for losses and damages sustained, *i. e.*, (a) the value of the *Capitan* and *Sugarland;* (b) the differences between the amount paid for the tankers by the Argentine Naval Commission and the amount received by the Maritime Commission, *i. e.*, $399,387.06; (c) the gross profit made by plaintiff on the illegal transaction; and (d) $49,852.01 for unrecouped repairs.

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[1] The case of *Esso Nederland N. V., etc.*, No. 689-53, decided May 8, 1957, presented a similar situation wherein a noncitizen sought relief from payment for desirable features pursuant to *A. H. Bull Steamship Co.* v. *United States, supra.* The court in the *Esso Nederland* case held that the specific intention which the parties intended and incorporated in the contract was that the desirable features were to be paid in addition to the already known floor prices of the ships. The contract provision in the instant case is exactly the same as in the *Esso Nederland* case and is as follows:

> "The Buyer agrees, if it shall be determined by the Commission upon examination of the (each) vessel, that the vessel lacks or contains desirable features as defined in clauses (2) and (3) of Sec. 3 (d) of the Act, then such purchase price shall be decreased, within the limits of the floor price of the vessel, or increased, by such amounts, if any, as may be determined by the Commission pursuant to said clauses."

We believe the defendant should be put in the same position as if the transfer had not been made to plaintiff. That is to say, had the tankers been sold directly to the Argentine Naval Commission, the Government could have charged $135,442.79 as class allowance and $28,756.81 for desirable features. These sums had been paid to the defendant and we hold that the defendant is entitled to retain them. The only other damage defendant has suffered is the cost of unamortized repairs which would be charged to noncitizen purchasers.

The findings show that "during the time that the Commission was authorized to sell to noncitizens, it made a charge to the buyer of the unrecouped cost of repairs made subsequent to January 1, 1947, less depreciation at the rate of $6,000 per month for each month of operation. This, for the *Sugarland* would have amounted to a charge of $49,894.01. If the policy respecting sales to citizens required a charge of the cost of unrecouped repairs made after July 1, 1947, the charge in the case of the *Sugarland* was $42 only, or $49,852.01 less."

Under section 6 of the Merchant Ship Sales Act, *supra*, the sale price to noncitizens was merely the minimum statutory price. Therefore, plaintiff's purchase as a citizen saved $49,852.01 which defendant could have charged a noncitizen. The Government lost that amount and is entitled to recover the same under its counterclaim.

Since as a result of the dissolution of the plaintiff corporation, Manuel Rodriguez acquired all but $4,255.59 of the corporate assets and has been made a party plaintiff to answer the defendant's counterclaim, we hold that judgment will be entered against the plaintiff corporation and Manuel Rodriguez personally.

The plaintiff is not entitled to recover, and the petition of Manuel Rodriguez Trading Corporation is dismissed.

Defendant is entitled to recover of and from the plaintiffs, Manuel Rodriguez Trading Corporation and Manuel Rodriguez, on its counterclaim the sum of $49,852.01.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner George H. Foster, and the briefs and argument of counsel, makes findings of fact as follows:

1. The Manuel Rodriguez Trading Corporation was from January 1947 to February 1951 a corporation organized pursuant to the laws of the State of New York with principal place of business located at 220 Broadway, New York, New York. Manuel Rodriguez was the principal stockholder, and he, in his capacity as president, actually operated as sole owner. Hereinafter, the term plaintiff refers to the corporation or to Manuel Rodriguez personally.

2. Plaintiff, by contract dated April 6, 1948, acquired from the United States Maritime Commission two T–1 tankers, the *Sugarland* and the *Capitan* at a price of $887,019 each. The price was in accord with the Ship Sales Act (50 App. U. S. C., sec. 1739) and the rules and regulations issued pursuant thereto as set forth in General Order 60 of the U. S. Maritime Commission.

3. The contract provided for a reduction of price by an amount equal to the cost, as determined by the Commission, which would be required to enable the Commission to deliver the vessels in class with valid certificates of classification and inspection in accordance with the minimum requirements of the rules and regulations of the American Bureau of Shipping and the U. S. Coast Guard Marine Inspection.

4. Plaintiff filed claims for reduction of price and reductions were allowed in the total sum of $135,442.79. Pursuant to the contract, said reductions were based on the following:

The *Sugarland*

$4,094.00	for repairs.
15,259.37	for predelivery and maintenance expenses.

The *Capitan*

$94,067.00	for repairs.
22,022.42	for predelivery and maintenance expenses.

Title to the *Sugarland* was transferred to the plaintiff on June 8, 1948, and title to the *Capitan* was transferred August 20, 1948.

5. On October 21, 1948, plaintiff applied to the Commission pursuant to sections 9 and 41 of the Shipping Act for approval to sell the vessels to the Argentine Naval Commission.

On December 7, 1948, the Commission approved the proposed sale to the Argentine Naval Commission.

6. On December 14, 1948, plaintiff sent a certified check for a deposit as required. The vessels were thereafter transferred from the U. S. Registry.

7. On June 3, 1949, plaintiff requested the Commission to reconsider the requirement that the allowance of $135,442.79 be paid to the Commission. The Commission refused to change its decision and upon request for reconsideration thereof, the request was denied. Plaintiff was so advised on September 12, 1949.

8. The contract of purchase contained the following provision:

> The Buyer agrees, if it shall be determined by the Commission upon examination of the (each) vessel, that the vessel lacks or contains desirable features as defined in clauses (2) and (3) of Sec. 3 (d) of the Act, then such purchase price shall be decreased, within the limits of the floor price of the vessel, or increased, by such amounts, if any, as may be determined by the Commission pursuant to said clauses.

On June 8, 1948, plaintiff wrote to the Maritime Commission with reference to the *Sugarland*. The letter contained the following:

* * * * *

> The absence or presence of desirable features not having been determined by the Commission, in accordance with the terms of the contract of sale, we agree to pay to the Commission the cost of such desirable features chargeable to the Buyer under the terms of the contract of sale or the Commission will make an allowance, within the limits of the floor price of the vessel for the absence of such features.

* * * * *

Homer C. Clay, who was acting as attorney in fact for plaintiff, on August 20, 1948, wrote similarly relating to the *Capitan*.

The Commission determined that both on the *Sugarland* and on the *Capitan* there were desirable features and designated them as follows:

	Depreciated value
Sugarland:	
Heating coil installation	$23,284.23
Diesel generator	3,238.12
Low pressure Evaporating plant	1,128.50
Capitan:	
Low pressure Evaporating plant	1,105.96

In response to a request for information as to the amount of the charge for the heating coil, the Commission on October 7, 1949, advised as follows:

* * * * *

In this connection, your attention is drawn to Contract MCc–61155, Exhibit A, Paragraph 1; and General Order 60, Subpart A, Section 299.1 (f) (3). Pursuant to the above, the Bureau of Engineering has advised that at the time of delivery of the MV SUGARLAND to you there were on board certain heating coils. The unadjusted statutory sales price (87% of the prewar domestic cost) is $24,200, against which depreciation at the rate of five percent per annum from the date of installation of such coils (September 5, 1947) to the date of title transfer (June 8, 1948) is allowed. After depreciation for this period is deducted the charge for the heating coils is $23,284.23, which will be charged to your account.

* * * * *

The depreciated values charged for the other features were derived as follows:

Sugarland

Diesel generator: Statutory Sales Price Unadjusted		$3,760.00
Depreciation:		
Normal: 5% from 8–31–45 to 6–8–48	$520.85	
War Service: ½% from 8–31–45 to 9–2–45	1.03	
		521.88
Amount charged		3,238.12
Floor Price of Desirable Features		2,625.00

Sugarland

Low Pressure Evaporating Plant: Statutory Sales Price Unadjusted		1,310.00
Depreciation:		
Normal: 5% from 8–31–45 to 6–8–48	$181.47	
War Service: ½% from 8–31–45 to 9–2–45	.03	
		181.50
Amount charged		1,128.50
Floor Price of Desirable Features		900.00

Capitan

Low Pressure Evaporating Plant: Statutory Sales Price Unadjusted		$1,310.00
Depreciation:		
Normal: 5% from 7-14-45 to 8-20-48	$203.14	
War Service: ½% from 7-14-45 to 9-2-45	.90	
		204.04
Amount charged		1,105.96
Floor Price of Desirable Features		900.00

9. Due to a shortage of privately-owned tanker tonnage to meet the demand for oil, the Maritime Commission operated its tankers and kept them in repair. In cases where the tankers were sold before the Commission had recouped the repair expense from operations, the Commission required the buyer to pay a part of these repair expenses.

The *Sugarland* and the *Capitan* were sold to plaintiff pursuant to the policy governing sales to U. S. citizens and Act IV of the contract covered this repair expense.

On June 8, 1948, plaintiff wrote the Commission with respect to repair expenses on the *Sugarland* and deposited $20,834 to cover repair costs.

It was later determined by the Commission that only $42 for repair expenses should be charged and the balance of the deposit was returned.

THE GOVERNMENT'S COUNTERCLAIM

10. The Government has filed a counterclaim for the proceeds received by plaintiff from the acquisition of these two tankers and the subsequent transfer of them to the Argentine Naval Commission. In connection with the counterclaim, the Government impleaded Manuel Rodriguez personally as a party plaintiff.

11. During the corporate existence of the Manuel Rodriguez Trading Corporation, Manuel Rodriguez was the president of the corporation. The stock of the corporation was originally issued on January 30, 1947. Manuel Rodriguez was issued 49 shares, his wife, Adele Rodriguez, a citizen of Cuba, was issued 30 shares, and one share was issued to Louis Russell. Of the stockholders, Manuel Rodriguez alone paid consideration for the stock.

As of September 2, 1948, Manuel Rodriguez acquired the stock of his wife, and as of December 29, 1950, the assets of the corporation were distributed to the two remaining stockholders as follows:

Manuel Rodriguez	$336,191.81
Louis Russell	4,255.59

The corporation was dissolved by a certificate of dissolution filed February 1, 1951, but dated December 29, 1950.

12. The Merchant Ship Sales Act of 1946 approved March 8, 1946 (60 Stat. 41), provided that the Maritime Commission might sell certain Government-owned war-built vessels to a citizen of the United States, defined in the act to include a corporation, if such corporation is a citizen of the United States within the meaning of sec. 2 of the Shipping Act of 1916, as amended. (39 Stat. 729, 46 U. S. C. sec. 802.)

The sales to citizens were to be at a "statutory sales price." Statutory sales prices in the case of tankers was defined in the act (sec. 3d) to mean "an amount equal to 87½ per centum of the prewar domestic cost of a tanker of that type" subject to adjustments set forth therein. Under certain conditions also set forth in the act (sec. 6) sales to non-citizens were authorized. By act of February 27, 1948 (62 Stat. 38), sales to non-citizens were prohibited after March 1, 1948.

13. On April 13, 1946, the Maritime Commission promulgated rules and regulations and supplements thereto (dated August 17, 1946) which recited that the estimated cost of T–1–M–BT tankers as of January 1, 1941, was $994,000, the domestic war cost $1,774,038. The unadjusted statutory sales price of 87½ per centum of the 1941 cost was $869,750. A limitation on the adjustments provided for in the act, was that in case of a tanker, no adjustments should reduce the statutory sales price to less than 50 percent of the domestic war cost, thus fixing a floor price of $887,019. The regulations and supplements were published in the Federal Register of April 23, 1946, April 30, 1946, and August 17, 1946. (11 Fed. Reg. 4459, 4702.)

14. In November 1947, John E. Jacobsen, then an employee in the Bureau of Operations of the Maritime Commission,[2] advised Manuel Rodriguez that there was a possibility

[2] Jacobsen was on annual leave from August 31, 1947, to December 22, 1947, and on "furlough" thereafter to February 28, 1948.

that ten T–1 tankers might be purchased from the Maritime Commission for resale to Argentina.

At that time there was located in New York City an Argentine Government purchasing commission, known as the Argentine Naval Commission.

On December 19, 1947, plaintiff retained Homer C. Clay and John E. Jacobsen to represent it in bringing about the sale of ten or any less number of tankers, for which services Clay and Jacobsen were to receive on a contingent basis a fee of $25,000 for each tanker actually purchased.

15. On February 18, 1948, the plaintiff made written application to the Maritime Commission to purchase ten designated tankers at the statutory sales price. In the application, it was stated that two of the three stockholders and directors were citizens of the United States, namely, Manuel Rodriguez and Louis Russell. The application stated that plaintiff was not then and never had been engaged in the shipping business.

In connection with the application, there was forwarded to the Maritime Commission as evidence of good faith two certified checks, each for $1,000,000, drawn by the Argentine Naval Commission by its chief on February 14, 1948, payable to the Treasurer of the United States. One check was drawn on the Chase National Bank and the other on the National City Bank of New York, which banks certified the checks on February 16, 1948.

16. Prior to the formal application, Manuel Rodriguez had on December 30 and 31, 1947, conferred with members of the Argentine Naval Commission in New York and on December 31, 1947, wrote to that commission sending specifications of the ten tankers which had been discussed at the December 30 and 31 meetings.

The letter contained the following:

* * * * *

> *PRICE.*—Originally the price of these vessels, to the United States Government, was $1,774,038.00. If these vessels were to be built today, according to the present cost of labor, the price would be *$2,040,143.00* as you can easily verify.
>
> The present basic sale price is $887,019.00 for each vessel, and we are selling them to you at the following prices:

1 to 5 vessels	$965,000.00 each.
6 to 8 vessels	950,000.00 each.
8 to 10 vessels	935,000.00 each.

INSPECTION.—They can be inspected as soon as you wish, since we already have the required permits from the U. S. Maritime Commission to go to inspect them, as we indicated to you.

PUBLIC SALE.—These vessels are not on public sale, but we have very good and well-founded reasons, according to the letters that I showed you, to believe that we can obtain them immediately. In the difference between the basic price and the price that we quoted you there would be included all the necessary expenses for obtaining the vessels for you, including transfer of "*titles*," change of "flag," transfer expenses, fees, etc. For this reason we believe this is a very convenient offer for you.

DELIVERY.—These vessels are to be delivered immediately.

We want it clearly understood that this offer is subject to the approval of the U. S. Maritime Commission, and in addition, we bind ourselves to obtain the "*flag*" change.

In the event that we are not able to obtain the change of flag, this sale becomes null and void and the deposit that you made by check to the name of the U. S. Maritime Commission will be returned to you immediately.[3]

On February 4, 1948, Clay had wired Rodriguez as follows:

STRONG PROBABILITY THAT CONGRESS WILL PROHIBIT SALES WAR BUILT VESSELS TO FOREIGN COUNTRIES AFTER FEBRUARY 29. URGE APPLICATION BE FILED IMMEDIATELY.

Also, previous to the formal offer, plaintiff and the Argentine Naval Commission on February 14, 1948, entered into a contract whereby the Argentine Naval Commission agreed to purchase, and plaintiff agreed to sell, ten tankers for $935,000 each. The letter of agreement contained the following:

* * * * *

FOURTH.—The Seller promises to obtain a change of flag and an export permit, if it is necessary, so that these vessels can be legally transferred to the Government of the Republic of Argentina. It is expressly established that if for any reason the legal transfer of same cannot be effected, this Contract becomes null and void,

[3] This is a translation from the Spanish of the original letter.

and that neither party will demand from the other indemnification of any kind. In this event, the deposit made to the U. S. Maritime Commission in the offer to buy will be returned immediately to the Argentina Naval Commission.

FIFTH.—In order to effect the offer to purchase these vessels from the U. S. Maritime Commission, the Argentina Naval Commission delivers in advance to the Seller the sum of TWO MILLION U. S. DOLLARS (U. S. $2,000,000.00) in two checks made to the order of the Treasurer of the United States; one for ONE MILLION U. S. DOLLARS (U. S. $1,000,000.00) against The National City Bank, No. 1359, and another for the same amount against The Chase National Bank, No. 1391, both signed on the same date as this Contract.

SIXTH.—It is expressly indicated that this Contract will be executed as a public document after the approval of the sale by the U. S. Maritime Commission.[4]

* * * * *

17. When the formal application was filed with the Maritime Commission on February 18, 1948, it was referred to various officers of the Maritime Commission for comment, making reference to the request that purchase would be on condition that transfer to Argentine registration be permitted. At a meeting of the Maritime Commission on March 1, 1948, the application for purchase of the ten tankers, for sale and transfer to a foreign registry and flag was formally disapproved.[5] At 11:30 P. M., March 1, 1948, however, the sale of one tanker to plaintiff for transfer to Argentina was approved.

Senate J. R. 173 approved February 27, 1948, 62 Stat. 38, prohibited the sale of a war-built vessel to a non-citizen after March 1, 1948.

18. On March 5, 1948, Rodriguez wrote to the Argentine Naval Commission as follows.

> As you well know we presented our application to the U. S. Maritime Commission on February 18, 1948, for the right to purchase ten (10) petroleum tankers with the right to transfer the title and registry of the same to the Argentine flag.

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[4] A translation from the Spanish.

[5] On the same date similar action was taken with reference to other offers; one tanker for transfer to Panamanian flag and 3 tankers for transfer to the Argentine flag.

At 11:30 P. M., on March 1, 1948, one-half hour before such sales would become forbidden by law, we signed with the Maritime Commission for the purchase of one tanker.

* * * * *

Meanwhile, it was evident that a law would be enacted which would affect our application and on February 3, 1948, I personally informed you thereof by telephone. There was a great probability that the Congress would forbid the sale of these types of vessels to foreign countries following February 29, 1948, and the application had to be presented immediately.

On February 18, 1948, our fears were realized. The House of Representatives of the United States passed a bill forbidding such sales to persons who were not citizens of this country, or representatives thereof, after March 1, 1948. A few days later the same bill was passed by the Senate and signed by the President of the United States. Hence, our application coincided with the Congressional action which discontinued the sale of the types of vessels in which we were interested, after March 1.

The result was an "avalanche" of applications for these and other types of vessels for foreign governments and their representatives. A member of the Maritime Commission informed us that they had more than forty applications for the purchase of the tankers which we were endeavoring to buy.

Not only did the demand increase due to the imminence of the date of expiration of the law, but on February 18, when our application was finally presented, only six tankers remained unsold. The other four which we wanted had already been sold prior to our application. The competition for these T–1 tankers produced a terrible pressure upon the Maritime Commission.

Each applicant, of course, tried to obtain favorable consideration for his application. As you well know, we were active. We contacted persons having high connections with the majority of the officials of the Maritime Commission and we received the strongest possible promises that they were going to give us two or more tankers, but they were unable to give them to us due to an application of the Standard Oil Company (a corporation of the United States) for three vessels for the service of the Dutch East India [sic], which application by law had to receive preference.

We continued and shall continue to maintain contact with members of the Maritime Commission and we had

and still have officials of the United States making representations on our behalf. Likewise, thanks to the kind efforts on your part, the Argentine Embassy in Washington sent a note to the Department of State recommending the sale of these types of vessels to the Argentine, and, thereby, along with the influential persons whom we know in said Department of State, we have been able to obtain great pressure from the same in favor of our application. Needless to say, the promises made to us that we would receive two or more vessels did not materialize.

We are still endeavoring to obtain one additional T–1 tanker on the premise that we, the purchasers, are citizens of this country (a corporation of the State of New York) and that, therefore, the law does not deprive us of making these purchases. Furthermore, there is a remote possibility that we may obtain still another vessel, the one which they are endeavoring to obtain for us. It may well be that we will be successful; however, at this time we cannot evaluate the possibilities.

* * * * *

You can rest assured that we will continue our efforts and, as we obtain favorable results, we will communicate the same to you.[6]

19. On March 7, 1948, plaintiff's attorney in fact, Homer C. Clay, wired the Secretary of the Maritime Commission as follows:

APPLICATION MANUEL RODRIGUEZ TRADING CORP HEREBY AMENDED TO ELIMINATE ALL REFERENCE TO TRANSFER OF SHIPS TO ARGENTINE REGISTRY APPLICANT DESIRES TO PURCHASE AS AMERICAN CITIZEN TERMS CASH ON DELIVERY WITH TWO MILLION DOLLARS NOW DEPOSITED WITH APPLICATION TO BE APPLIED ON PURCHASE PRICE.

On March 10, 1948, plaintiff filed a formal amendment to the application of February 18, 1948, by striking therefrom:

* * * * *

* * * all reference to the transfer of the vessels referred to therein to foreign flag or registry and to provide that the applicant will purchase any one or more of the vessels referred to in said application as a United States citizen (applicant is a New York corporation) for operation under the flag and registry of the United States and to further provide that should applicant be granted the

[6] Translation from the Spanish.

right to purchase any vessel or vessels pursuant to its amended application, applicant will obtain the services of one of the established and experienced ship operating companies to operate said vessel or vessels.

20. March 11, 1948, plaintiff's amended application was referred to the Maritime Commission by memorandum from the appropriate officer, the Chief of the Large Vessel Sales Division, James L. Pimper, who recommended the sale of two T1–M–BT tankers with the advice that the "applicant wishes to eliminate original reference to transfer to Argentine registry and purchase as an American Citizen" and to pay cash in full on delivery. The Commission was advised that:

* * * * *

Applicant claims no shipping experience but states that it will obtain the services of one of the established and experienced ship operating companies to operate the vessels when purchased.

* * * * *

* * * since the applicant offers to pay cash in full for the vessel, the Commission is justified in considering that the applicant possesses the necessary financial resources.

* * * * *

Applicant proposes to operate the vessels in established tanker trades, chiefly from North Atlantic ports to the River Platte and occasionally from Venezuelan ports to the River Platte.

* * * * *

March 12, 1948, the Commission approved plaintiff's application as to three T–1 tankers.

By memorandum of March 26, 1948, Mr. Pimper advised the Commission that plaintiff had been "allocated the last three remaining tankers of this type" but the Navy Department had requested the transfer of one tanker for military operations so that he recommended that the action of March 12, 1948, approving the sale of three tankers be modified to approve of the sale of two only. This recommendation was approved by the Commission March 26, and on March 31, 1948, the Commission advised plaintiff's representative of the approval of the sale "for operation under United States flag," the terms of payment to be "cash in full on delivery."

21. Under date of March 31, 1948, plaintiff and the Argentine Naval Commission entered into a contract relating to the *Capitan* as follows:

FIRSTLY: The Seller sells to the purchaser and the latter buys from the former, a Diesel tanker, T1-M-BT1, with the following description:

Former name: *Klickitat.*
Present new name: *Capitan.*
Builder's No.: 83.
U. S. Maritime Commission Hull No.: 2624.

The other characteristics of the said ship are already known by the Purchaser. This tanker is at present in the possession of the U. S. Maritime Commission.

SECONDLY: The Seller, on February 18, 1948, with the previous authorization and in accordance with the Argentine Naval Commission, applied to the U. S. Maritime Commission for the purchase of ten T-1 tankers, which application was accompanied by the deposit of 2 certified checks drawn by the Argentine Naval Commission in favor of "The Treasurer of the United States" for the amount of $2,000,000.00 (two million dollars) and requested on that occasion the approval of the U. S. Maritime Commission to transfer the registration and title of the said ships to the Argentine flag.

THIRDLY: Since it is the desire of the Argentine Naval Commission to obtain more tankers like the ten opportunely offered, in order to satisfy the needs of the Argentine Navy, and in order not to lose the possibilities of purchasing which exist at present, Manuel Rodriguez Trading Corporation is requested to serve as intermediary in the acquisition of the aforementioned oil tankers, this commitment being subject to the feasible future transfer of the same to the Ministry of the Navy of the Argentine Republic. This transfer should be made when circumstances permit it to be done legally.

FOURTHLY: The aforementioned transfer must be made within four months after the signing of this contract. In case this commitment cannot be fulfilled, the Argentine Naval Commission will be able at the end of this time to grant an extension of two months, at the most, or to arrange the sale of those ships thus recovering the money invested up to that moment in the purchase, preservation, insurance, maintenance, etc., of them.

FIFTHLY: Therefore, and in consideration of the mutual benefits to be obtained in this contract, and other good and valuable considerations, Manuel Rodriguez

Trading Corporation and the Argentine Naval Commission mutually agree to the following:

A. The Corporation shall be able to modify the application dated February 18, 1948, made to the U. S. Maritime Commission in any way which may be necessary in order to obtain the approval for sale of the tankers to the party applying as a corporation of the United States.

B. The Corporation promises to try to obtain on its own account from the U. S. Maritime Commission the greatest number of tankers within the number of ten which appears on the application mentioned in A.

C. The certified checks of the Argentine Naval Commission for $2,000,000.00 (two million dollars) which are at present deposited with the U. S. Maritime Commission, will be able to remain there as a guarantee for the application as it has been modified, until May 31 of this year.

D. If the request is approved, the Corporation will be able to receive the title of the number of tankers which are granted to it and the money to pay for them will be turned over by the Argentine Naval Commission, at the official price of 887,019 dollars, fixed by the U. S. Maritime Commission, and in case the latter should change it, an attempt should be made to come to an agreement on it by both contracting parties.

E. Once the Corporation has received the title or titles of the ships as is mentioned in the preceding paragraph, the Corporation will take steps with the U. S. Maritime Commission to get its approval for the change of title to the Argentine Naval Commission, and of the flag and registration to the Argentine Republic and to obtain and provide for this Naval Commission without any expense to the Purchaser, all the necessary documentation so that the ships can be used without any obstacles by the Argentine Government.

F. When the Corporation has obtained the legal transfer of the title of ownership to the Argentine Naval Commission, the change of flag to the Argentine Republic and the aforementioned documents the Commission will pay to Manuel Rodriguez Trading Corporation the amount remaining between the price paid to the U. S. Maritime Commission and the prices fixed in the offer of December 31, 1947 and an explanation added on the day of the date.

G. In case the laws or governmental provisions make it impossible to obtain the legal transfer of the title to the Argentine Naval Commission and the change of flag to that of the Argentine Republic, both contracting

parties will consult with one another for the purpose of finding an appropriate solution to the problem presented, and in case they cannot come to this agreement, they will proceed to sell the ships on the account of the Argentine Naval Commission, without any loss to the Corporation, and from the profits, 20 % will be credited to Manuel Rodriguez Trading Corporation to compensate for any expenses which it might have incurred in the sale of the ships. In case the Government of the United States of North America should expropriate the ships, it is understood that the payment which it makes will immediately be transferred to the Argentine Naval Commission.

H. *Expenses for Insurance and Other Expenses:* The expenses for insurance as well as any other expenses, as for example, expenses for the wharf, towing, fuel. etc., will be paid by the Argentine Naval Commission. It is also understood that all the arrangements which are made for the insurance, wharf expenses, etc., will always be subject to the written approval of the Argentine Naval Commission.

SIXTHLY: From the moment this Contract is signed, the Argentine Naval Commission will be able to dispose of the ship in any way which it will deem convenient, but respecting the obligations of the flag.

SEVENTHLY: The Argentine Naval Commission will have a guarantee in this purchase by receiving in deposit from Manuel Rodriguez Trading Corporation, the titles or ownership of the ships and the receipts for the payments made by the said Corporation.

EIGHTHLY: Inspection: This ship has already been inspected by the Argentine Naval Commission, and it has accepted it.

As proof of the conformity of both contracting parties, four copies of the same kind and for one single effect are signed in the offices of the Argentine Naval Commission, on March 31, 1948.[1]

Accepted by the Seller

Manuel Rodriguez **(Signed)**

MANUEL RODRIGUEZ TRADING CORPORATION

Accepted by the Purchaser

(Signature illeyible)

ARGENTINE NAVAL COMMISSION

A similar contract relating to the *Sugarland* was made the same day.

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[1] Translation from the Spanish.

22. In reliance upon representations that the tankers were purchased for operation under the flag of the United States, under date of April 6, 1948, the Maritime Commission entered into a formal sales contract for the sale of the *Capitan* and the *Sugarland* to plaintiff at a floor price of $887,019. A copy of the contract is printed as Exhibit A to the petition and is incorporated herein by reference.

23. The two checks drawn by the Argentine Naval Commission and deposited with the Maritime Commission were not applied as payment for the two tankers. The checks were subsequently returned uncashed, one in April 1948 and the other in June 1948 after payments of the purchase price of the two tankers had been completed.

24. A summary of the payments for the tankers as reflected by the records of the plaintiff corporation is as follows:

1948:	*Capitan*	*Sugarland*	*Totals*
April 5	$88,701.90	$88,701.90	$177,403.80
May 7	600,000.00	600,000.00	1,200,000.00
June 7	----------	194,223.10	194,223.10
Aug. 19	104,250.10	----------	104,250.10
Subtotal	792,952.00	882,925.00	1,675,877.00
Less:			
Nov. 9, 1948, refund by the U. S. Maritime Commission for class work allowance	22,022.42	15,259.37	37,281.79
Net payments for vessels	770,929.58	867,665.63	1,638,595.21
Other Costs:			
(a) Payment for repairs (under par. IV, exhibit A of contract) upon delivery	----------	20,834.01	----------
Less refund to plaintiff, Oct. 17, 1950	----------	20,729.01	----------
Net additional cost on *Sugarland*	----------	42.00	42.00
(b) Payment to U. S. Maritime Commission upon delivery for consumable stores	5,516.00	7,512.00	13,028.00
(c) Inspection, repairs, insurance, and agency expense	133,908.78	62,690.59	196,599.37
Total cost	910,354.36	937,910.22	1,848,264.58

In accordance with the agreements, the Argentine Naval Commission advanced sums to plaintiff for payments of the tankers at the times, and in the amounts, as follows:

	Captain	*Sugarland*	*Totals*
April 2, 1948	$88,701.90	$88,701.90	$177,403.80
April 28, 1948	798,317.10	798,317.10	1,596,634.20
Subtotal (official price)	887,019.00	887,019.00	1,774,038.00
Dec. 23, 1948, balance	77,981.00	77,981.00	155,962.00
Total price of Dec. 31, 1947	965,000.00	965,000.00	1,930,000.00
Add:			
Oct. 25, 1949, additional payment for certain expense as provided under 5th (H) of the agreements	41,826.07	30,397.80	72,223.87
Total of amounts received	1,006,826.07	995,397.80	2,002,223.87

The funds advanced by the Argentine Naval Commission for the full official price of the ships were received by plaintiff corporation before it was required to make such payments to the United States Maritime Commission under its agreement to purchase them.

Plaintiff corporation's records contained no evidence of the receipt of the $200,000 deposit required by the United States Maritime Commission in December 1948, upon the approval of the transfer of title of the ships to the Argentine Naval Commission, nor of any refund of any portion of the same.

On the basis of the above accounts, the plaintiff corporation made a gross profit on the acquisition and transfer of the two tankers of $153,959.29.

25. On October 21, 1948, the plaintiff transmitted to the Maritime Commission application for the approval required by sections 9 and 41 of the Shipping Act of 1916, as amended, of proposed transfer to Argentine registry and sale to an alien, namely the Argentine Naval Commission, of each of the two tankers. The applications were on forms of the Maritime Commission which required statements by the applicant designed to elicit information desired by the Maritime Commission for consideration of the requests.

Item No. 3 of the application form requested information as to the total complement of the vessel and whether employ-

ment would be available for the officers and crew if the ship was sold. To this inquiry, plaintiff stated that no officers or crew were employed because the vessel was not in operation.

Item 4 related to the operation of vessel under American registry. To this, plaintiff stated, that because of facts set forth in the attached memorandum, the vessel had not been operated since owner acquired title. Under this item it was also stated that the vessel had been offered for sale to American citizens; that it had been on the market for sale for three months prior to the application and no offers had been received. It stated further that the proposed sales price was the "actual cost of vessel to owner," to be paid in cash.

Attached to the application was a letter from the Argentine Naval Commission under date of August 30, 1948, as follows:

> In reply to the attached ad which appeared in the New York Journal of Commerce, August 27, 1948, there is no evidence of the number of T–1 tanker [sic] you have for sale. For this reason, we herewith submit our bid to purchase such T–1 tankers as you may have for sale up to five vessels. We are prepared to pay in U. S. currency for five vessels or whatever number of vessels you may have less than five. In order to arrange for an inspection and to discuss the price, please contact us at once.

The "attached ad" was as follows:

> **T–1 TANKERS**
> **FOR SALE**
>
> U. S. flag. Immediate delivery
> Principals only. All cash in dollars
> Box Y 955, Journal of Commerce

Another attachment was in part as follows:

* * * * *

> When the Commission offered the tankers to the Manuel Rodriguez Trading Corporation in March 1948, the company was influenced to accept them by the fact that the demand for tankers at that time was so strong as to be perhaps unprecedented in peacetime. Private charter rates stood well above the Maritime Commission rates and the market price of vessels generally well above the statutory and floor prices. This situation induced applicant to believe that domestic employment of the vessels would be possible and profitable.
>
> The company accepted the vessels with the knowledge that it could operate, charter or sell the vessels in the domestic market, and/or under appropriate and mer-

itorious circumstances could apply to the Commission in accordance with the law for approval to change registry.

Although the vessels were allocated in March 1948, when the tanker market was strong, it was not until August 20, 1948, that repairs were completed on the second vessel and title was tendered to the Manuel Rodriguez Trading Corporation. During this period a drastic change occurred in the tanker market. Charter rates fell below the Maritime Commission scale, and there became a surplus of tonnage.

* * * * *

Notwithstanding the adverse and discouraging market situation, the company has made diligent efforts to employ the vessels profitably in the domestic market. Advertisements offering the vessels for sale were placed in the *New York Times* and the *New York Journal of Commerce* on August 25, 26, 27 and 29. In its efforts to find a market for the vessels, the company has been in frequent communication with brokers and operators in the oil transportation business. It has been found that no demand for these vessels exists. The only promising inquiries were from sources that desired to purchase for foreign transfer.

* * * * *

The lack of domestic market for T–1 tankers is not surprising in view of the characteristics and history of these particular vessels. The Manuel Rodriguez Trading Corporation is now informed that these vessels were never designed with any idea that after the war they would be useful or practical for ordinary commercial use. It is generally conceded that T–1 tankers are too small, too slow, and too expensive to operate to compete successfully in the present market. Although a crew of approximately 34 is required to operate the vessels, their capacity is only approximately 31,000 barrels, their speed only 10 knots. These characteristics place T–1 tankers at a distinct competitive disadvantage in relation to the average tanker which employs a crew of perhaps 40, has a speed of 14 to 16 knots and a carrying capacity four times as great as that of a T–1 tanker.

These vessels were intended for use by the U. S. Navy and by foreign governments. Perhaps the best indication of their lack of suitability for domestic operation is the fact that, with three exceptions (excluding the Manuel Rodriguez Trading Corporation, the Maritime Commission has sold these vessels to foreign buyers. The following record of the disposition of T–1 tankers is significant:

Argentine Government	2
Manuel Rodriguez Trading Corp. for Argentine Government	1
Government of Turkey	1
Compagnie Petroleo Lago (Venezuela)	1
Standard Oil (Central America)	1
Dutch Subsidiaries of Standard Oil	?
Five sold domestic as follows:	
Manuel Rodriguez Trading Corp	2
Standard of California	1
Texas Co	1
Tidewater Oil Co	1

Although the company lacks direct information as to the use to which the three other American buyers have put their tankers, it is believed that they are used by their owners for transportation of their own products in special situations where shallow draft small vessels can be utilized and expense of operation and speed are of no great importance.

Still another indication of the undesirability of T–1 tankers for American operations may be seen in the fact that the Maritime Commission still holds three of these vessels and apparently is unable to dispose of them to any American buyer.

After more than two years of availability, including the recent period of drastic oil shortage, no American buyers found these three ships desirable.

From the above indications it therefore seems clear that little domestic demand exists or is ever likely to exist for T–1 tankers.

To retain these vessels under American registry is apt to mean that they will lie idle. If they are transferred to foreign registry they will be in use and to that extent help prevent worldwide shortage in oil transportation.

The initial cost and repairs for the owner's account of the *Capitan* and *Sugarland* exceeded $1,800,000.00. The cost of maintenance is rapidly becoming an oppressive burden, and constitutes a grave threat to the solvency of the company.

Under these circumstances it is hoped that the Commission will see fit to grant the application of the Manuel Rodriguez Trading Corporation for the right to sell and deliver these two T–1 tankers to a citizen or to the government of the Argentine and for the right to transfer registry of the vessels consistent with said sale.

26. While the letter of August 30, 1948, attached to the application for authority to sell to a foreigner indicated that the Argentine Naval Commission was offering to buy in response to the blind ad in the New York Journal of Commerce,

the Argentine Naval Commission had contracted with plaintiff corporation to buy the two tankers owned by plaintiff corporation on March 31, 1948, and had advanced the funds by which they had been purchased by plaintiff. Plaintiff, having delivered to the Argentine Naval Commission the bills-of-sale and master carpenter's certificate, documents necessary for American registration (46 U. S. C. sec. 24), sale by plaintiff to American purchasers for domestic operation would have required the Argentine Naval Commission to consent thereto, at least to the extent of returning to plaintiff these documents. Plaintiff, however, in August 1948, inserted the advertisement mentioned in the attachement to the request for authority (finding 25) as well as similar advertisement in the New York Times of August 29, 1948. At least six responses were received to the advertisements not counting the Argentine Naval Commission. Four responses indicated a desire for foreign registration and two suggested domestic use. Plaintiff did not communicate with any of the 6 responders.

The application for transfer authority stated that the vessels were to be sold to Argentina at the actual cost to plaintiff. Homer Clay, plaintiff's attorney in fact, on November 9, 1948, wrote to the Maritime Commission, that Mr. Rodriguez had instructed him to advise that the proposed sales price to the Argentine Naval Commission was $912,000 for each tanker subject to adjustment for the heating coils and other items in the original cost of the vessels to plaintiff.

27. Following the allocation of the two tankers to plaintiff, the Argentine Naval Commission was consulted by Rodriguez with respect to actions taken in connection with the tankers as follows:

When the *Sugarland* arrived in Boston, April 28, 1948, the Naval Commission's engineers were on hand to inspect it. A letter dated May 19, 1948, from Admiral Colonna of the Argentine Naval Commission to Rodriguez requested information "concerning the transportation of naphtha and petroleum derivatives in the tank vessels that we have obtained from your firm." Rodriguez promptly obtained and furnished such information to the Naval Commission by letter of May 25, 1948, without questioning the statement. When work was to be done on the *Sugarland* or *Capitan*, the plans

were submitted by plaintiff to the Argentine Naval Commission in advance. When the sale of the *Sugarland* was closed with the Maritime Commission, June 8, 1948, the bill-of-sale and master carpenter's certificate were delivered to Homer C. Clay by the Maritime Commission and these documents together with a memorandum of the closing and a statement of account were transmitted to the Naval Commission by Rodriguez June 10, 1948, and the same action was taken with respect to the *Capitan* documents later. The *Sugarland* was delivered to Rodriguez at Hoboken, New Jersey, on June 8, 1948. Pursuant to arrangements between Rodriguez and Admiral Colonna the Argentine Naval Commission stationed a crew of about fifteen men aboard both the *Sugarland* and *Capitan* to act as watchmen pending the contemplated transfer to the Naval Commission. In August 1948 the Argentine Naval Commission also sent its plans and specifications for modifications and repairs on the *Sugarland* to Rodriguez in order that he might obtain quotations from various firms.

28. Plaintiff's books included both the *Sugarland* (which was delivered June 8, 1948) and the *Capitan* as part of plaintiff's merchandise inventory and as having been sold to the Argentine Naval Commission in April 1948. Plaintiff's accounting records show that the tankers were purchased for resale and not for operation. Plaintiff's books were revised as of June 30, 1948, and then showed the Argentine Naval Commission had advanced $965,000 on each of the sales contracts for the two tankers, the vessels not having then been formally delivered. Plaintiff's Federal income-tax return for the fiscal year ending June 30, 1948, is consistent with the view that the two tankers were purchased for sale and not for operation.

29. Neither plaintiff nor its president, Rodriguez, had ever been engaged in the shipping business and had no experience in the operation of tankers. After acquiring title to the two tankers, plaintiff made no efforts to obtain the services of a ship operating company to operate the vessels. No officers or crews were hired.

30. Plaintiff's application for authority to transfer the vessels was considered by the chief of the Bureau of Government Aids of the Maritime Commission who, on November

26, 1948, recommended to the Commission that the application be denied. The application came before the Commission at a meeting of December 2, 1948. It was then considered but not acted upon.

At a meeting of the Commission on December 7, 1948, Homer C. Clay and Ralph Immell represented plaintiff and after referring to the information contained in the application, advised the Commission further that plaintiff's president had invested his entire personal fortune of $1,800,000 in the tankers; that in order to cut down expenses, the crews had been reduced and guards put on board and that plaintiff was obliged to sell the tankers or go into bankruptcy. It was also represented that the proposed sales price of $912,000 per tanker adjusted for the value of the heating coils, might enable Rodriguez to break even but he stood to lose $45,000.

One of the commissioners at this meeting inquired of plaintiff's representatives as follows:

> Let me ask one other question. I don't know whether you have it of your own knowledge, but it would have a bearing. Is there any information that you have received, directly or indirectly, that could lead into a possible implication that your client had an arrangement in advance made with the Argentine interests prior to their filing an application, with the view that they would later come before this Commission and seek for approval of the sale and transfer?

The following answer was given by Mr. Clay:

> No, sir. I think it would be absolutely impossible for such an implication to be made. I advised Mr. Rodriguez when the new law went into effect that he must buy those ships, own them outright, that he must pay for them himself, that he could not even make any commitment or agreement to sell in the future. He has had that understanding and I have made him adhere most rigorously to the law in regard to his purchase of these vessels.

Thereafter the Commission took action as follows:

* * * * *

> A motion was made by Commissioner Carson, seconded by Commissioner Mellen, that the application of Manuel Rodriguez Trading Corporation New York, New York, for the approval required by Section 9 of the Shipping Act 1916, as amended (46 U. S. C. 808) of

the sale of 2 T1–M–BT1 tankers to the Argentine Naval Commission and the transfer of said vessels to Argentine registry and flag be approved, upon the condition that any and all allowances made to the Manuel Rodriguez Trading Corporation for placing the vessel in class and all monies due and owing the Commission by the said Manuel Rodriguez Trading Corporation shall be paid to the Commission prior to the issuance of any orders authorizing the transfer of flag and registry of the said vessels and the Company waives any claims for allowances.

Upon a vote being taken, Chairman Smith and Commissioners Carson and Mellen voted "yea," and Commissioners Coddaire and McKeough voted "nay," to the foregoing motion.

The proper officers of the Commission were authorized and directed to take any and all actions necessary and proper to carry the action of the Commission as above set forth fully into effect.

By memorandum of December 9, 1948, the Commission advised the Chief, Bureau of Government Aids, that at its meeting of December 7 it had considered his memorandum and approved plaintiff's application, part of which memorandum reads as follows:

* * * * *

* * * upon the condition that any and all allowances made to the Manuel Rodriguez Trading Corporation for placing the vessels in class and all monies due and owing the Commission by the said Manuel Rodriguez Trading Corporation shall be paid to the Commission prior to the issuance of any orders authorizing the transfer of flag and registry of the said vessels and the company waives any claims for allowances.

31. On December 10, 1948, the Commission advised plaintiff as follows:

This is to advise you that in the Maritime Commission at its meeting December 7, 1948, considered and approved, pursuant to Section 9 of the Shipping Act 1916, as amended (46 U. S. C. 808), the sale of your two T1–M–BT1 tankers *SUGARLAND*, O. N. 249212, and *CAPITAN*, O. N. 256418, to the Argentine Naval Commission, an agency of the Argentine Government, and the transfer of said vessels to Argentine registry and flag, upon the condition that, prior to the issuance of formal Transfer Orders in evidence of the approval of the trans-

fer of these tankers to Argentine ownership and registry as above set forth, any and all allowances made to your corporation for placing these vessels in class and all monies due and owing the Commission by your corporation in connection with the sale by the Commission shall be paid (or provision therefor by way of deposit be made) to the Commission and upon the receipt from your company of a waiver of any claims for allowances.

Since the exact amount of these allowances and adjustments has not yet been determined and, in view of the fact that you desire that the said Transfer Orders be issued as early as possible, you are requested to deposit with the Commission a certified check for $200,000.00, upon the receipt of which the Commission will issue the aforesaid Transfer Orders. If the final amount of your indebtedness is found to be less than the amount of your deposit, the difference will be refunded to you. If additional sums are required to meet your indebtedness, you will deposit such additional sums to the Commission upon request.

Your counsel has informed us that you will wish to request the Commission's reconsideration of the appropriateness of certain of these charges against you. It is understood that the deposit of the above-mentioned certified check will not preclude you from requesting the Commission for such a reconsideration, but it is also understood that any future action by the Commission on this matter will be acceptable to you as final.

Plaintiff accepted the prescribed conditions in its letter dated December 14, 1948, which states:

> Receipt is hereby acknowledged of letter signed by Mr. A. J. Williams, Secretary of the United States Maritime Commission, dated December 10, 1948, advising of Commission approval on December 7, 1948, of the sale by this Corporation of the two tankers *SUGARLAND* and *CAPITAN* to the Argentine Naval Commission, an agency of the Argentine Government and the transfer of said vessels to Argentine registry and flag, upon and subject to the conditions therein contained.
>
> The Manuel Rodriguez Trading Corporation, a corporation organized and existing under the laws of the State of New York, with offices at 220 Broadway, New York 7, New York, hereby accepts and agrees to the conditions contained in said letter and pursuant to the terms and conditions thereof, herewith delivers to the United States Maritime Commission a certified check

bearing date December 13, 1948, and No. 2419, drawn upon The Chase National Bank of the City of New York, Rockefeller Center Branch, payable to the order of the United States Maritime Commission in the amount of $200,000, drawn by the Argentine Naval Commission, signed by officials designated as Accountant and Chief, Naval Commission, respectively, to be held in a special deposit by the Maritime Commission subject to the terms and conditions in said letter of December 10, 1948.

Subsequent to the exchange of the correspondence dated December 10 and 14, 1948, the Commission delivered transfer orders to plaintiff authorizing the sale of the tankers to the Argentine Naval Commission and their transfer to Argentine registry and flag. The transfer orders did not recite the conditions under which issued because neither the Commission's regulations nor practice required this.

32. In fixing the price for these two tankers, the Maritime Commission reduced the floor price of $887,019 by the sum of $135,442.79 as the cost of putting the vessels in class to operate under the flag of the United States. In order to comply with the conditions attached to the grant of authority to transfer the vessels to Argentina, there was deposited by plaintiff a certified check of the Argentine Naval Commission dated December 13, 1948, for $200,000 to cover this allowance.

On April 20, 1949, the Commission advised plaintiff as follows with regard to the requirements:

* * * * *

As to paragraph 5, the Commission, as above indicated, required your company, as a condition of its approval of the transfer to Argentine registry and flag, to deposit with it the sum of $200,000 to insure that all class allowances and moneys due the Commission from your company in connection with the sale would be repaid to the Commission. This sum is still on deposit and no part has been refunded to you. The Commission has agreed to reconsider the appropriateness of certain of these charges against you upon the condition that any future action by the Commission on this matter will be acceptable to you as final.

On June 30, 1949, Clay and Immell filed a formal application on plaintiff's behalf repeating the same representation as

before as to the sale to Argentina and stated that the sale occurred "after issuance of the foreign transfer orders," and as plaintiff had sold the vessels to Argentina at the price paid by plaintiff to the Maritime Commission, plaintiff could not be reimbursed by the Argentine Commission for the refund of the class allowance, and

> * * * At the time these ships were purchased from the Maritime Commission there was no understanding that I know of, with anybody, that our client would appear subsequently and ask for an order to resell. It was definitely stated by people in authority for the Commission that no such arrangement would be tolerated.
>
> * * * * *
>
> * * * If this were purely a bookkeeping entry we wouldn't be here. If the Rodriguez Trading Corporation, having purchased these ships, had let them sit idle and then subsequently sold them to the Argentine Naval Commission, we feel of course that in that case these allowances that you would make should be wiped out and the Rodriguez Trading Corporation should not profit by the extent of the allowances made for putting the ships in class.

The Commission denied the request on August 12, 1949, and plaintiff was so advised. Had the vessels been sold to a non-citizen, the allowance of $135,442.79 below the statutory sales price would not have been made. Also, during the time that the Commission was authorized to sell to non-citizens, it made a charge to the buyer of the unrecouped cost of repairs made subsequent to January 1, 1947, less depreciation at the rate of $6,000 per month for each month of operation. This, for the *Sugarland* would have amounted to a charge of $49,894.01. As the policy respecting sales to citizens required a charge of the cost of unrecouped repairs made after July 1, 1947, the charge in the case of the *Sugarland* was $42 only, or $49,852.01 less.

33. The two vessels involved were built in 1945 and the Commission determined that the domestic war cost was $1,774,038 each. This amount was approximately 15 percent less than the 1947 costs. The Argentine Naval Commission offered to pay $965,000 plus for each vessel in March 1948.

34. The evidence establishes that prior to March 1, 1948, and subsequently, the plaintiff was acting, in effect, as agent

for the Argentine Naval Commission in acquiring these vessels and that at all times plaintiff planned in one way or another to accomplish the transfer of these vessels from the Maritime Commission to Argentina.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff, Manuel Rodriguez Trading Corporation, is not entitled to recover and its petition is dismissed.

The court further concludes as a matter of law that the defendant is entitled to recover of and from the plaintiffs, Manuel Rodriguez Trading Corporation and Manuel Rodriguez, on its counterclaim the sum of forty-nine thousand, eight hundred fifty-two dollars and one cent ($49,852.01).

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